



# ISLAMIC LAW AND SOCIAL CHANGE : A STUDY

## DISSERTATION

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS  
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BY

MOHD. IRSHAD

Under the supervision of

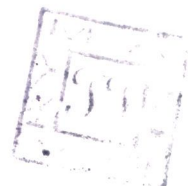
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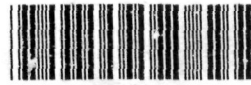
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FACULTY OF LAW  
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### C E R T I F I C A T E

This is to certify that **Mr. Mohd. Irshad**, student of LL.M. (Final year) has completed his dissertation entitled "**Islamic Law and Social Change: A Study.**", in partial fulfilment of the requirements for the award of the degree of Master of Laws. He has conducted the study under my supervision. I wish him all the success in life.

  
[ M. Moshir Alam ]  
Reader

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Mohd. Irshad  
[Mohd. Irshad]

Department of Law  
Aligarh Muslim University  
Aligarh

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## Introduction

Islamic law originates from Divine Revelation contained in the Holy Qur'an and the Sunnah of Holy Prophet Muhammad (Peace and blessings of God be upon him). The Qur'an and the Sunnah as preserved in the large corpus of Hadith literature are the foundation of Islamic law. The Revelation determines the norms and basic concepts of Islamic Law and the Qur'an, by making the observance of the rules of the Shariah a matter of human conscience, has dignified the concept of law. The Shariah, though not law in the proper sense, is the law of Islam. Fiqh is a science that deduces rules of law from the Shariah. Accordingly Shariah is known through the Fiqh.

The law is followed by jurisprudence and a particular legal theory springs from a legal system which already exists in the society. The theory of law in Islam came into being during the lifetime of Holy Prophet and it existed in its nebulous form during the time of Companions. They thought of sources of law and the method of reasoning for solving fresh problems and in certain cases they gave their own rulings also. But the classical legal theory was not given its technical and systematic form by the companions. It developed and formalised by the jurists of second and third generation. The principles of law were derived from the law itself which was in the process of developing since the earliest days of Islam. Thus Islamic Jurisprudence is an after thought which evolved as a result of the formalization of law as its justification.

The great jurists of past arrived at their legal findings on the basis of their study of the Qur'an and Sunnah. This study was extremely deep and conscientious but the results were often highly subjective. The reason was that they were determined by each scholar's approach and interpretation to the legal sources of Islam as well as by the social and intellectual environment of his age. That was the period of rapid legal activity and there emerged certain Schools of law which were consolidated to the extent that adherence to one of these schools was common and also necessary. This adherence was required not only of the layman but also of the jurists. This requirement was called Taqleed. The concept of Taqleed affected the growth of Islamic law adversely because it reduced the legal activities to the confines of particular Schools. The procedure of reasoning became mechanical and the whole body of Islamic law was cast into a rigid mould, not allowing further independent growth.

The Shariah is a 'Sacred law' par excellence; perfect, immutable and not in need of change and the principles of Ijtihad, Ijma, Qiyas, Masalih etc are used to interpret and justify the already existing rules through the science of Fiqh.. Hence the Shariah and Fiqh are two different concepts. The phenomenon of Taqleed which came into being after the establishment of schools is responsible for legal unproductivity in Islamic world. The Fiqh, which is the result of fallible

human wisdom, became identified with the infallible Shariah. The Muslim masses followed the Fiqh blindly taking it Shariah and it stopped the independent growth of Islamic laws.

The relationship between Islamic law and social change is one of the basic problems of Islamic legal theory. Law which having its associations with physical laws, is assumed to be unchanging, always faces the challenges of social changes which demand adaptability from it. Most often the impact of social change is so profound that it affects legal concepts ~~legal~~ as well as institutions and thus creates a need for fresh theories. The problem of social change and legal theory is of particular significance in Islam. Islamic law is generally defined as religious, sacred and hence immutable. How does such a law face the challenge of change? This question has brought to the fore the problem of the adaptability of Islamic law which has been so widely discussed, yet remains debatable. The problem has been generally formulated in the form of the following question: Is Islamic law immutable or is it adaptable to the extent that the change and modernization sought can be pursued under its aegis? The study answers this question positively that through the mechanism of Ijtihad we can face any challenge of the change even without changing basic essence of Islamic law.

Ijtihad is the agent of mobility in the structure of Islam. It is considered the mother of all the secondary sources

of Islamic laws. The early jurists resorted to it and developed a fullfledged jurisprudence and responded positively to the call of society. But during the centuries followed after the glory of Islam the role of Ijtihad has been greatly diminished because of the wrong impression that its gate were closed. Every passing of time brought before Umma new problems and the jurists of later age instead of trying to solve them through the Divine mechanism (the Shariah) and independent reasoning sought the help of particular Fiqh (Schools of laws). They tried to find out the solution from within the confines of particular School and it proved the hollowness of their legal system because the early jurists could not have anticipated all the problems and provided their solutions. Without understanding this fundamental flaw the people came to the wrong conclusion that Shariah was rigid and sterile. The result was nothing but the rejection of Islamic legal principles and its replacement by borrowed Western legal principles. Apart from these practical implications, theoretically Taqleed or blind following of Schools of law badly affected the proper development of Islamic legal theory. Ijtihad was replaced by the dogmatic Taqleed and creativity and fresh enquiries became the part of history. In other words the history of Islamic Jurisprudence after a glorious start became the history of dogmatism and rigidity.

The world of Islam and Islamic scholarship are by now familiar with the proposition that the gate of Ijtihad in

Islam was closed. Nobody quite knows when the gate of Ijtihad was closed or who exactly closed it. There is no statement to be found anywhere by any competent authority about the desirability or the necessity of such a closure or of the fact of actually closing the gate, although one finds judgements by later writers that the gate of Ijtihad has been closed. Allama Iqbal enumerates few reasons of closing the gate of Ijtihad such as the invasion of Baghdad by Tatars, rise of Rationalist movement and the rise and growth of ascetic Sufism. According to him the theoretical possibility of Ijtihad is admitted by the Sunnis, but in practice it has always been denied ever since the establishment of the schools. Actually such judgements were passed on earlier state of affairs and do not refer to any given statement about the closing of the gate of Ijtihad. It may, therefore, be safely concluded that whereas the gate of Ijtihad was never formally closed by anyone. They were open, are open and will always remain open.

This study touches all these aspects in a comprehensive way. It attempts to differentiate the Shariah from Fiqh and finds out the causes of present stagnation in the legal fabric of Islam. The Shariah is not rigid or dogmatic but it is the reluctance of Muslim jurists to resort Ijtihad and to come out from the boundaries of Schools of law which has given the colour of rigidity and dogmaticism to the Shariah. In fact, the Shariah stands for dynamism and quite capable to adapt in any

society and to solve any problem at any point of time. This study starts from this basic presumption. The first chapter deals with the Shariah and the sources of its origin. The second chapter carries reflection on the Fiqh and its manifestations and deals with the secondary sources of Islamic law. The third chapter is about the emergence of various schools of law and doctrine of Taqleed. An attempt has been made in this chapter to find out the reasons of the emergence of schools and how the concept Taqleed, which was an administrative necessity, unfolded in negative way and caused legal unproductivity in the fabric of Islam. The fourth chapter deals with Shariah from dynamic perspective. The fifth chapter draws a clearcut distinction between the Shariah and Fiqh. Some concluding remarks have also been made in the same chapter.

## CHAPTER-I

### The Shariah and its Sources

Islam is the religion of nature i.e. the very essence of Islam is enshrined in both man and the nature. The tenets of Islam make man aware of three fundamental concepts, viz. Tawheed i.e. the Unity of God, Risalat i.e., the concept of Prophethood and Akhirat i.e. the life hereafter. This is the message of all religions. Since the message is one, so Islam represents the unity of religions. "Islam is an attributive title. Anyone who possesses these attributes is a believer in Islam. According to the Qur'an among the people of all ages there have been good and righteous people who possessed these attributes and all of them were Muslims."<sup>(1)</sup> Thus, all the Prophets who appeared from time to time propagated Islam, that is belief in God, faith in the Day of Judgement and faith in the Prophets. They asked the people to submit to the will of God. Islam itself gives an idea of submission and surrender, and the person who surrenders to the will of God is a Muslim. It was common to the teachings of all Prophets and that is what constitutes Al-Din.

Since the beginning of mankind there is one religion i.e. Islam but actualisation of Islam differed from time to time, place to place and Prophet to Prophet. To materialise this God has changed its outer expression i.e. the Shariah from time

to time. But with the advent of Holy Prophet Mohammad even this outer expression has been fixed forever.

Maududi writes: "Apart from this Din there is Shariah, the detailed code of conduct or the canons comprising ways and modes of worship, standards of morals and life and laws that allow and proscribe, that judge between right and wrong. Such canon law has undergone amendments from time to time and though each Prophet had the same Din, he brought with him a different Shariah to suit the conditions of his own people and time. This process ended with the advent of Prophet Mohammad, the last Prophet, who brought with him the final code which was to apply to all mankind for all times to come. Din has undergone no change but all the previous Shari'ahs stand abrogated because of the comprehensive Shariah that Mohammad brought with him. This is the climax of the great process of training that was started at the dawn of human era"<sup>(2)</sup>

Din gives man a clear notion of God and other metaphysical issues, thus mentally preparing him for total submission to God. The Shariah on its part touches every outer shade of his private and public life. In other words man in Islam does not find lack of direction in any of his social and personal sphere.



### The Shariah:-

"Literally the word Shariah means a course to the watering place and a resort of drinkers. The Arabs applied this term particularly to a course leading the watering place which was permanent and clearly marked out to the eye. Hence it means the clear path or the highway to be followed. The Qur'an uses the words Shirah and Shariah in the meaning of Din (religion), in the sense that it is the way ordained by God for man, or in the sense that it is the clear cut path of God for man. The term Shariah was used in the Prophet's time for the essential of Islam" (3)

"It is to be borne in mind that the literal meaning of the term Shariah is "the way to a watering place and, since water is indispensable for all organic life, this term has in time came to denote a system of laws both moral and practical which shows man the way towards spiritual fulfilment and social welfare. Hence religious law is the widest sense of the term" (4)

The Shariah is the way which leads one into the folds of Islam. It is a clear path which is neither vague nor gloomy. This has occurred several times in the Qur'an. Allah says

"For everyone of you we have ordained a divine law (Shariah) and on the open road (Minhaj): (5)

"And finally (O Muhammad) we have set thee on a way by which the purpose (of faith) may be fulfilled. So follow then

this (way) and follow not the likes and dislikes of those who do not know (the truth)"<sup>(6)</sup>

It becomes clear from these verses that they emerge solely from the will of God and secondly, that they are obligatory in nature. One is bound to follow the Shariah if one wants to be in the circle of Din. In short the Shariah is only that which has come in the Qur'an and the Sunnah i.e. the Nass ordinances emerging from the clear wordings of these fundamental two. Allama Asad writes: "Thus, it is the Nusus of the Qur'an and Sunnah and only these that collectively constitute the real, eternal Shariah of Islam. This Shariah concerns itself exclusively with what the Law-Giver has ordained in unmistakeable terms as an obligation or put out of bounds as unlawful, whereas the far larger area of things and activities which the Law-Giver left unspecified neither enjoining nor forbidding them in Nass term must be regarded as allowable (mubah) from the Sharai point of view"<sup>(7)</sup>

The Shariah emanates from revelations (Wahi) Manifest revelation constitute the Holy Qur'an and internal revelation are in the form of the Sunnah which are the fundamental sources of the Shariah. The Nass ordinances which emerge from the Qur'an and the Sunnah are the basis of the Shariah.

#### THE QUR'AN

In Islam, the ultimate source of authority is God alone. Everything of this world or other worlds, including the

Prophet, is subordinate to Divine Law which emanates from Divine Revelation (Wahi). The revelation, which is of two kinds - manifest (Zahir) and internal (Batin) constitute the Shariah. The Qur'an is composed of such manifest revelations as were made in the very words of God through angel Gabriel. The Qur'an is the primary source of the Islamic Shariah, in point of time as well as in importance. It is the first source of the Shariah in point of time because Islam and its society owe their birth to the words of the Qur'an. It is the paramount source of the Shariah in point of importance because it contains the very words of God and it is the foundation upon which the very structure of Islam rests.

The Qur'an was given to the world in fragmentary forms, extending over a period of twenty three years. the beginning of the revelation of the Qur'an as quoted by Bukhari, Muslim, Nasai and Trimadhi was in last three days of the month of Ramadhan, thirteen years before the Hijrah. With the opening five verses of 96 surah it came to an end with the verse 281 of the second surah. The Qur'an in its present form is a book divided into 114 chapters and 6666 verses dealing all forms of knowledge in essence, that is why it is called Ummal Kittab i.e. the Mother of the books. It is also called al Furqan i.e. discernment of truth and falsehood. The term Qur'an gives us the idea of a thing for recitation.

"The main purpose of the Qur'an, according to Allama Iqbal is to awaken in man the higher consciousness of his relation with God and Universe".<sup>(8)</sup> The Qur'an is the book which channels the life of a Muslim through the Shariah. If Shariah is the way for Muslims, the Qur'an is the soul of this way. The primacy and importance of the Qur'an, in the life of a Muslim, becomes clear from the observation of S.H.Nasr "The Qur'an is the tissue out of which the life of a muslim is woven: Its sentences are like the threads from which the substance of his soul is knit"<sup>(9)</sup>

#### **Compilation and Preservation of the Qur'an:-**

"The Qur'an was compiled in written form during the life time of Holy Prophet. He had appointed 42 stenographers for the purpose of giving dictation of the Qur'an."<sup>(10)</sup> Whenever new verses were revealed, the Holy Prophet committed them to memory and dictated to his trustworthy stenographers like Ali Ibn Abu Talib, Zaid Ibn Tabit, Abd Allah Ibn Masud, Obay Ibn ka'ab etc. Thus the Qur'an was written on leaves, stones, bones etc. Apart from this, the Prophet ordered compulsory recitation of the portions of Qur'an in every canonical prayer, and in the Night vigil (optional prayer) recitations of long chapters were highly recommended. All these brought each and every chapter of the Qur'an to the full attention of the public.

The whole of the Qur'an was made in the written form during Prophet's life time but was not bound in a single volume.

The Qur'an itself indicates this fact:

"Only the clean should touch it" (11)

The possibility of touching arises when it is tangible. It can be tangible only when it is in written form. Further God says:

"It is for us to gather it" (12)

So far as the preservation of the Qur'an is concerned, God Himself takes this responsibility to preserve and protect it from any distortion or interpolation. God says:

"For behold, it is for us to gather it (in they heart) and to cause it be read (as it ought to be read)" (13)

As this verse indicates God adopts such a mechanism that each and every word of the Qur'an will be protected till the last day. During the war against false Prophet Musailima thousands of companions who had memorised the Qur'an, were killed. Hazrat Omar got alerted from it and he convinced the Caliph Abu Bakr of the need for the compilation of the Qur'an into one volume. Abu Bakr assigned this responsibility to Zaid Ibn Tabit, the trustworthy secretary of the Prophet who accomplished the work with wondrous accuracy. One copy of the same was kept with Hafza, the wife of the Prophet and daughter of Hazrat Omar. Later during the caliphate of Uthman some variations in the reading of the Qur'an were reported from the

remote parts of Islamic state. On hearing this he got prepared many copies of the Qur'an from that kept with Hafza and sent to different parts of State. Until this day we have the same Qur'an revealed to the Holy Prophet and it will remain so till the last day.

### The genesis of Law in the Qur'an:-

The Qur'an is the primary source of legislation but it does not contain law in the codified form. The reason is that it is not merely a Book of Law but an amalgam of law and ethics. It governs every shade of human life in a wholesome manner. The Qur'an, infact, addresses itself to the conscience of man. That is why the legal verses were revealed in the form of moral exhortation, sometimes exhorting people to the obedience of God and occassionally instilling a keen sense of fear in the minds of Muslims. The Qur'an does lay down general legal principles and rules of legal nature relating to family, society, state, international community etc.

"Alif, Lam, Mim, This is the book of Allah there is no doubt about it. It is a guidance to God fearing people"<sup>(14)</sup>

Here the term guidance encompasses whole fields of life including law besides morality and ethics.

"Then (O, Mohammad) we sent this book to you, has brought the Truth it confirms whatever has remained intact from the Book at the time of its revelation and safeguards and

perfect it. Therefore you should judge between the people by the law sent down by Allah and do not follow their desires by turning side from the truth that has come to you" (15)

"We have sent down to you this book which makes plain everything and guidance" (16)

These verses make it clear that God has revealed laws through the Qur'an and made it obligatory for man to do justice among the people and he should follow the commands of the Qur'an. The ordinances given in the Qur'an are not in a systematic way or like a statute. They are scattered all over the Qur'an, especially those chapters revealed in Madina. Since the Shariah is not the whole dimension of the Qur'an, it has got only limited number of verses having direct legal bearing. "Regarding family law they are laid down in 70 injunctions, civil law in another 70, penal law in 30, constitutional law in 10, international relations in 25 economic and financial orders in 10". But according to Said Ramadan: "such an enumeration, however, can only be approximate. the legal bearing of some injunctions are disputable whereas in some others it simultaneously applies to more than one sphere of law" (17)

Apart from the controversy over the number of the legal verses in the Qur'an, it is clear that the Qur'an is neither a legal code in the modern sense, nor it is a compendium of ethics. The primary purpose of the Qur'an is to lay down a way of life which regulates the relationship of man with man and

his relationship with God. The Qur'an gives directions for man's social life as well as for his communion with his Creator. The laws of inheritance, rulings for marriage and divorce, provisions for war and peace, punishments for theft, adultery and homicide, are all meant for regulating the ties of man with his fellow beings. In addition to these specific legal rules, the Qur'an abounds in moral teachings which provides the way to achieve higher consciousness and establish a close relationship with God.

#### Rules and principles of Interpretation in The Holy Qur'an:-

The Holy Qur'an itself enunciated the principle or rule of interpretation in this verse:-

"He it is Who has revealed the Book to thee; some of verses are decisive. They are the basis of the Book, and others are allegorical. As for those in whose hearts there is perversity, they follow the parts of its which is allegorical, seeking to mislead and seeking to give it their own interpretation, but none knows its interpretation except Allah, and those well grounded in knowledge, say, we believe in it, it is all from our Lord; and none do mind except those having understanding (18)

In this verse it is stated that there are two kinds of verses in the Holy Qur'an namely the decisive and allegorical the latter being those which are capable of different



interpretations. The decisive verses are the basis of the Holy Book, that is, that they contain the fundamental principles of religion. The third point is that some people seek to give their own interpretation to allegorical and are thus misled. In other words, serious mistakes arise only when a wrong interpretation is placed on words which are susceptible of dual meaning. Lastly, in the concluding words, a clue is given as to the right mode of interpretation in the case of allegorical statements "It is all from our Lord". That is to say, there is no disagreement between the various portions of the Holy Book.

The following rules may serve as a best guide in interpretation of the Holy Qur'an:-

(i) The fundamental principles of religion are enunciated in the decisive verses of the Holy Qur'an, and, therefore, no attempt should be made to establish a principle on the strength of allegorical passage.

(ii) The explanation of the Qur'an should in first place be sought in the Qur'an itself, for, whatever, the Qur'an has stated briefly, or merely hinted at, in one place, will be found expanded and explained elsewhere in the Holy Book itself.

(iii) The Holy Qur'an contains allegory and metaphor along with what is plain or decisive, and the only safeguard against being misled by what is allegorical or metaphorical is that the interpretation of such passage must be strictly in consonance

with what is laid down in clear and decisive words, and not at variance therewith

(iv) When a law or principle is laid down in clear words, any statement carrying a doubtful significance, or a statement apparently opposed to the law so laid down, must be interpreted in the light of the principles enunciated. Similarly that which is particular must be read in connection with it and subject to more general statements.

Hadith affords the best explanation or interpretation to the Holy Qur'an. Prophet Mohammad himself is therefore called the living Qur'an. The Holy Qur'an declares that Prophet is made by God the best example to be followed.

#### Hadith and Sunnah

Sunnah of the Holy Prophet is the second principle source of Islamic Shariah. It is second in point of time and authority only to the Holy Qur'an. As revelations have been of two kinds - manifest (Zahir) and internal (Batin). Manifest revelation is the very words of God which are composed in the form of the Holy Qur'an. Internal revelation consists of the actions, sayings, teachings and judicial decisions of the Holy Prophet which are called Hadith. The opinion of Prophet did contain the element of inspiration (Ilham) of God but the inspiration was indirect. The Qur'an speaks:-

"He does not speak out of his own desire, All this is revealed" (19)

The Qur'an lays down the basic principles but Hadith supplements and broadens it and bring such principles into practical arena. It is the Sunnah of the Holy Prophet that dresses the Qur'an with practical application and gives the concrete shape to the Qur'anic teachings. Mohammad Asad writes on the significance of Hadith in following words:-

"Many verses of the Holy Qur'an have an allegorical meaning and could be understood in different ways unless there was some definite system of interpretation. And there are, on the other hand, many items of practical importance not explicitly dealt with in the Qur'an. The spirit prevailing in the Holy Book is, to be sure, uniform throughout; but the deduction of practical which we have to adopt is not in every case an easy matter. So long as we believe that this Book is the Word of God; perfect in form and purpose, the only logical conclusion is that it never was intended to be used independently of the personal guidance of the Prophet, as embodied in the system of Sunnah" (20)

Dr. Riaz-ul-Hasan Gilani clarifies the vital importance of Sunnah:- "For an institution to be workable and thoroughly practicable, it is necessary that it should be practically demonstrated. However detailed the description of an institution may be, it can not be practicable unless it is

practically demonstrated. No student of science can perform his experiment simply on the basis of written instructions. Practical demonstration in the laboratory is a must"

He further observes "If the Qur'an has itself described all the principles and details of Islamic society and culture. Islam would have not been practicable, at least for a common man. It ~~would have been~~ the concern of scholars alone and that too with practical limitations" (21)

The above observations made by the great scholars of Islam elucidate the vitality of the Sunnah as a source of the Islamic Shariah. In fact the Qur'an and the Sunnah are fundamentally interdependent like an organic body constituted by different parts. When they both are united together, they make a living organism in the form of the Shariah. The Qur'an clarifies the relationship between the two in a beautiful manner:

"And came to you from God, the light (Prophet) and the Book" (22)

The light of the Sunnah is useful and essential for reading the Book of God i.e. the Qur'an. It is usually said that there are two basic sources of the Shariah, it is for the sake of convenience to ~~describe~~ and explain the things easily. But as a matter of fact the Shariah has only one source, and that is, Revelation [Manifest & Internall].

It is as much obligatory on the part of a Muslim to follow the Sunnah of Holy Prophet as to follow the book of God.

The sacred Shariah visualizes a hierarchy of obedience. In this structure Allah is fountain Head, followed by the Holy Prophet and then comes Ullul Amr (Charged with authority). But the critical difference is that in case of Ullul Amr the obedience is conditional. One is bound to follow them as long as they go in line with the Shariah. But in the case of Messenger the question of conditional obedience does not arise. The unqualified obedience is due to God and His Messenger. The Qur'an speaks:-

"Whoever obeys the messenger indeed obeys Allah" (23)

"He does not speak out of his own desire" (24)

Since God made obedience of the Prophet obligatory on people, this means that what comes from the Prophet comes from God. "Imam Al-Shafii interprets the word Hikmah occurring in the Qur'an together with the Book as the Sunnah of the Prophet" (25)

So far as the terminology of the Hadith and Sunnah is concerned, they are not one and the same thing. The Hadith and Sunnah are two different things carrying different meanings. The Hadith is the narration of the behaviour of Prophet while the Sunnah is the law deduced from the narration. In other words, Hadith is the 'carrier' and 'vehicle' of the Sunnah. The Sunnah is contained in Hadith. Therefore it is the fact that a certain Hadith contains many Sunnahs.

### Compilation and Authentication of Hadith:-

As alleged by the orientalist that the Ahadith were compiled much after the death of Holy Prophet, so every Hadith is unreliable unless proved otherwise. They try to convince on two points: firstly the Hadith were orally transmitted and were not recorded during the life time of Holy Prophet. Secondly the sense uttered by the Holy Prophet could change during the oral transmission. This is not only a wrong view but an attempt to represent traditions as an edifice created by forgery and fabrication.

"In fact, the collection and recording of the Hadith were started even during the life time of Holy Prophet. The companions of the Prophet used to take the Hadith as binding authority and used to learn it by heart for themselves and for the purpose of further transmission. Some of them used to write it also. Abu Daud and Darimi have narrated from Abdullah bin bin Al-As:

"Whatever I heard from the Prophet I used to write it to learn it by heart. Some persons from the Qureish objected to this and said that Prophet was a man and sometimes he was talking in anger and sometimes he was happy. At this I stopped writing and also told this to the Prophet. He ordered to continue writing and pointed with his finger towards his mouth and said after swearing in the name of God that nothing but truth comes out of that" (26)

Ibn Abd al Bar says "The Prophet dictated a book on the law of taxation, monetary compensation, inheritance and general law. Its copies were given to the governors appointed outside Madina" (27)

From the above two traditions it becomes clear that the collecting and recording of Ahadith were started during the lifetime of Prophet. Later this process formally ended in the compilation of six classical books namely, Sahih al Bukhari, Sahih al Muslim, Sunan abi Daud, Jami at Trimidhi, Sunan ibn Maja and Nasa. Imam Malik's Muwatta is worth of mention here because it was compiled much before the above six.

Some scholars contend on the basis of a report in Bukahri that Prophet prohibited to recording of Ahadith. But what actually the Prophet prohibited was the recording of the Qur'an with Ahadith. He feared that such recording might result in the mixing of two. Dr. Riazul Hasan Gilani quotes "The Prophet only prohibited writing of the tradition with the Qur'an in the same document, the mixing up of the two could cause confusion to the reader. Besides there are a lot of historical backing that Prophet dictated to his companions letters which were to be sent to the rulers of other countries. He even dictated some legal matters also for recording, quoting these Dr. Hamidullah has proved that Hadith was recorded even during the life time of Holy Messenger" (28)

### **Authentication of Ahadith:-**

The Muhaddithun (Hadith scholars) were very strict in determining the veracity of Hadith, because if a Hadith is proved to be authentic, it automatically establishes a precedent in Islam. Besides they were fully aware of the gravity of the sayings of Messenger.

The Muhaddithun evolved a specific science to determine the veracity of Ahadith. They applied the process of Isnad which means to establish a chain starting from narrator to the Holy Prophet. secondly they, for this purpose, investigated and classified the biographical data of all the narrators.

This was only because of this strict test that Imam Bukahri accepted only 7397 Ahadith out of lakhs which he collected. This methodology of Muhaddithun pervades all aspects of the reporting, the life of the reporter, text of the report, social, historical and psychological background of both Rawi and Riwayat in order to judge the authenticity of a Hadith.

The Muhaddithun reject the Ahadith which are contrary to the message of the Qur'an and the human reason. Moreover, the Ahadith which promise extremely high reward for relatively small meritorious acts and severe punishments for the slight deviation are also not accepted as authentic. If any Hadith purporting to be from the Prophet, which is about common facts of daily experience, does not rank above Akhbar al-Ahd (single authority reports) is also suspected because of the



obvious reason that Hadith relating to daily experience should not be confined to one or two transmitters.

### Classification of Ahadith and the Sunnah:-

These two have been classified on the basis of their mode and manner in which they were originated. The Sunnah has been classified into the three classes on the basis of mode of its origin but unlike it the Ahadith have been classified on the basis of their authenticity.

- (i) Sunnat-ul-fiel:- Actions of the Holy Prophet what he did himself.
- (ii) Sunnat-ul-qaul:- Sayings of the Holy Prophet what he enjoined by words.
- (iii) Sunnat-ul-tagrir:- Silent approval of the Holy Prophet to what was done in his presence without his disapproval.

Ahadith are also classified into the three classes:-

- (i) Ahadith-i-mutwatra:- Ahadith that are of universal recognition and held absolutely authentic.
- (ii) Ahadith-i-Mashhoor:- Ahadith which though known to a majority of people, do not possess the character of universal recognition.
- (iii) Ahadith-i-Wahid:- Ahadith which neither possess the character of universal recognition and nor they are known to a majority of people but depend on isolated individuals.

The latter two types of Ahadith can be authentic unless they are corroborated by various channels which are continuous and the narrators are trustworthy. Ahadith on the ground of the degree of authenticity are further classified into three categories:-

Sahih Hadith:- Valid Hadith

Dha'if Hadith:- Weak Hadith

Maudhu Hadith:- Fabricated Hadith

### Footnotes

- (1) Mawdidi, Abul A'la: Towards Understanding the Islam, 17 (Delhi, 1993)
- (2) Id at 95
- (3) Hasan, Ahmad: The Early Development of Islamic Jurisprudence, 7 (Islamabad, 1970)
- (4) Asad, Muhammad: The Message of the Qur'an 767 (Gibraltar, Darul Andalus, 1980)
- (5) The Holy Qur'an, 5:48
- (6) Id at 45:18
- (7) Asad, Muhammad: The Principles of State and Government in Islam, 13 (University of California Press, 1961)
- (8) Iqbal, Muhammad: The Reconstruction of Religious Thoughts in Islam, 13 (Lahore, 1989)
- (9) Nasr, S.H: The Ideals and Realities of Islam, 42
- (10) Alkatani: Kitab al-Tradit al-Adariya, Volume I, 61
- (11) The Holy Qur'an, 56:79
- (12) Id at 75:17
- (13) Ibid
- (14) Id at 2:1-4
- (15) Id at 5:48
- (16) Id at 16:89
- (17) Ramadan, Said; Islamic Law: Its Scope and Equity, 43 (Geneva, 1970)
- (18) The Holy Qur'an, 3:6
- (19) Id at 53:3-4
- (20) Asad, Muhammad; Islam at Cross Roads, 105, 106 (Lahore, 1941)
- (21) Gilani, R.H: The Reconstruction of Legal Thoughts in Islam, 56, 57 (Delhi, 1982)

(22) The Holy Qur'an, 5:15

(23) Id at 4:80

(24) Id at 53:3-4

(25) Op.cit.3 at 50

(26) Op.cit.21 at 74,75

(27) Id at 76

(28) Id at 77

## Chapter II

### Fiqh and its Manifestations

#### Science of Fiqh:

"The original meaning of the term Fiqh is the understanding and the knowledge of something. In this sense Fiqh and Fahm are synonymous. An Arabic idiom goes: So and so neither understands nor comprehends". The word Fiqh was originally used by the Arabs for a camel expert in covering: he who distinguishes the she-camels that are lusting from those that are pregnant. Accordingly, the expression Fahl-Faqih was current among them. From this expression it is believed, the meaning of deep knowledge and understanding has been derived".<sup>(1)</sup>

The verb Faqaha means " to comprehend " thus Fiqh in its noun form means " comprehension". Prof. Asaf Fyzee says " Fiqh literally means intelligence. It is the name to the whole science of jurisprudence because it implies the independent exercise of intelligence in deciding a point of law in the absence or ignorance of tradition on the point".<sup>(2)</sup> In the early period the term Fiqh was not exclusively used to denote law. It was mainly used to denote the deep understanding of anything. Ahmad Hasan writes, " Fiqh-al-Lughah (understanding of the science of language) is the title of a work produce by al-Tha alibi. This work has nothing to do with law ; instead it deals with the rules and regulations the mastery of which enables a person to acquire command over the Arabic language. He further observes:-

"The term Fiqh has occurred in many places in the Holy Qur'an in a general sense of understanding. The Qur'anic expression" that they may gain understanding in religion" shows that in the Prophet's time the term Fiqh was not applied in the legal sense alone but carried a wider meaning covering all aspects of Islam, namely theological, political, economic and legal". (3)

Gradually the scope of the term Fiqh was narrowed down only to the legal sphere. After the emergence of four schools of thought it became completely identified with law and the four great legists used it for this purpose. The question of Fiqh arises only in the absence of clear Nusus of the Qur'an and the Sunnah. If the Shariah clearly speaks of anything and sets forth a clear legal frame work, nobody has right to frame laws. The Holy Qur'an says:-

"Whenever God and His apostle have decided a matter, it is not for a faithful man or woman to follow another cause of ~~his or her own choice~~" (4)

Shariah and Fiqh are the two different entities. The Shariah is the one dimension of the infallible Divine will and Fiqh is the result of man's fallible deduction. There may be changes in the Fiqh but so far as the Shariah is concerned it is infallible and unchangeable. In short, God revealed His laws to become the guideline for mankind and inherent in the laws there are immense potentialities for movement and creativity which

gives birth to the Science of Fiqh. The Holy Qur'an says:-

"For everyone of you we have ordained a Divine law (Shariah) and an open road (Minhaj).

From the above verse two things come out: Shariah and Minhaj. Shariah is fixed, final and immutable but Minhaj is the mechanism for temporal legislation to meet the needs of ever changing social conditions. Getting inspiration from the Holy Qur'an and the Sunnah the early doctors of Islam evolved the science of Fiqh which resulted in the emergence of various schools of thoughts.

It is the human reason which shapes the Fiqh. Subjective human will construct Fiqh based on the objective and infallible Divine will i.e. Shariah. Later jurists categorised this manifestation of human wisdom by naming them Ijma, Qiyas, Masalih-al Mursalah, Ijtihad etc. This categorisation does not speak of any fundamental difference among them. It only gives us an idea about the different methodologies of these streams of Fiqh.

#### **Principle of Ijtihad :**

"In the critique of Pure Reason, Kant has very rightly said that every event is unique. The main difficulty which was disturbing Plato before he met Socrates was uniqueness of every event. Plato said that it is not possible to put the foot twice in the same water, we lead an uncertain life.

We cannot formulate rules and regulations about the course of events. Socrates solve this puzzle by giving him a satisfactory answer. The concrete events may be unique but there characteristics are repeated. We can formulate laws according to the characteristics exhibited by events".

According to Ibn Qayyim the propositions that the laws of Qur'an and the Sunnah are limited whereas the possible cases are unlimited, is a wrong conception. The acts and the transactions if classified according to their categories are limited in number; and God and the Prophet while expressing the Divine will, ~~cover~~ series of acts and transactions at one and the same time" (5)

The Shariah has laid down the guidelines for the future course of action. But if there is no clearcut Nusus of the Qur'an or Sunnah regarding particular event or issue, then only the question of Ijtihad literally means striving, exerting and as a term of Jurisprudence it means the application by a lawyer (Faqih) of all his faculties to form an independent judgement on a legal question. The Mujtahidun or the jurists exert to find out laws from the Qur'an and the Sunnah and apply to the prevalent conditions of the society. Shah Wali Allah has described the scope of Ijtihad in a beautiful way. He says "that the objective of Ijtihad is to exert to know that if this problem has occurred before the Prophet, what would have been his judgement"? (6)



The Holy Qur'an says: "And those who strive hard in our cause, we shall certainly guide them in our path "(7)

The famous interview of Muadh Ibn Jabal further illustrates the scope of Ijtihad. When Muadh Ibn Jabal was being sent (as governor) to Yemen, The Prophet asked him :

" How will you decide the cases that will be brought before you ? "

" I shall decide them according to the Book of God" replied Muadh.

" And if you find nothing concerning (a particular matter in the Book of God).

" Then I shall decide according to the Sunnah of God's Messenger"

" And if you find nothing about it in the Sunnah of God's Messenger? "

" Then," replied Muadh, " I shall exercise my own judgement without the least hesitation"

Thereupon the Prophet slapped him upon the chest and said " Praised be God, who has caused the Messenger of God's Messenger to please the latter ". (8)

Two things are evident from the above Hadith: when Nusus of the Qur'an and Sunnah speaks clearly regarding any matter, there cannot be Ijtihad. But if they are silent, the jurists are bound to do Ijtihad. The legal effect of Ijtihad is the probability of conclusion so arrived being correct, but the

possibility of such conclusion being erroneous cannot be ruled out because of the inherent fallibility of human reason. Infallibility is the attribute of only God and Prophet. So if a jurist makes wrong deduction, he incurs no spiritual responsibility for he has done his best to reach the right conclusion. Holy Prophet clearly said:

"If a judge interprets and gives a right judgement, he will have earned two rewards. If he interprets but commits error in his judgement, he will still have earned one reward." (9)

Ijtihad is, in fact, the mechanism which equips the Muslim Ummah to face the ever changing social conditions. Allama Iqbal has called this mechanism Ijtihad " Principle of movement in the structure of Islam ". (10) Ijtihad is the agent of mobility in the structure of Islam. It can rightly be called as the mother of all the secondary sources.

All the successes and failures of Islamic world during the last several centuries can be attributed to the use and non use of of this principle. We can see the successful utilization of this principle, when the Muslims achieved eye catching victories in all the fields: cultural, political, economic, etc. The classical jurists of Islamic Shariah responded positively to the call of the society with the help of this mechanism. This principle of Ijtihad helped them to become the torch-bearers of the civilisation. But unfortunately in the

successive centuries it has not been wisely utilised or almost forgotten. This resulted in the immobility of Islam which we have been experiencing in the form of stagnation in the social, cultural and legal fabric of Islam.

### Ijma:

Ijma has been defined in the classical Fiqh literature, in different ways. One definition says: "Ijma is an agreement of the Islamic community on a religious point". Another definition states: "Ijma is a consensus of opinion of the persons competent for Ijma, when a religious issue arises, whether rational or legal." A third definition runs: "Ijma is a unanimous agreement of the jurists of the community of a particular age on a certain issue." The first two definitions have been criticised by the later jurists themselves, while the third has been accepted as the standard definition."<sup>(11)</sup>

Ijma is a very important legal notion in Islam which begins with the personal judgment of individuals and culminates in universal acceptance of a certain opinion by the community in the long run. In other words if Ijtihad represents basically an individual effort, Ijma is the culmination of these different Ijtihads into a consensus and that too among the Mujtahids on a particular legal topic.

The justification of Ijma comes directly from the Holy Qur'an and the Sunnah of the Prophet. Holy Qur'an says:-

"O - you who have attained to faith pay heed unto God, and pay heed unto the Apostle and unto those from among you who have been entrusted with authority; and if you are at variance over any matter, refer it unto God and the Apostle. If you (truly) believe in God and the last day. This is the best (for you), and best in the end." (12)

"But as for him who after guidance has been vouchsafed to him, cuts himself off from the Apostle and follows a path other than that of the believers, him shall we leave unto that which he himself has chosen, and shall cause him to endure hell, and how evils a journey's end." (13)

Holy Prophet says:

"My community will never agree on an error" (14)

"It is your duty to stand by the United Community and the majority (Al-Ammah)" (15)

"Follow the largest group" (16)

Though the concept of Ijma has Shariatic justification but it was not available during the lifetime of Holy Prophet. The reason is that the Revelation and the Prophet's words were the final answer to the problems that cropped up during that period. This concept came into being after the death of Prophet when the Muslims were faced with fresh problems. According to Imam Maliki; new facts require new decisions. The aim of the law is to fulfil the need of the society." Ijma plays a crucial role in the development of

Islamic law. The existing body of Fiqh is the result of age long Ijtihad and Ijma process. It is an on-going process and a continuous activity and changes with the changing of the circumstances. This is, infact, the best mechanism to check the fallibility of Ijtihad.

#### **Classification of Ijma:-**

(i) Ijma of the companions of the Prophet:- It is universally acceptable throughout the Muslim world and should be obeyed at any cost. Since their piety and sincerity are Qur'anically proved. Besides they were fortunate to learn the things directly from the Holy Prophet. Allama Iqbal accepts this view with regard to the question of fact. Regarding the question of law he says "I venture to think, on the authority of Karkhi, that later generations are not bound by the decisions of the companions. Says Karkhi. The Sunnah of the companions is binding in matters which cannot be cleared up by Qiyas, but it is not so in matters which can be established by Qiyas.

(ii) Ijma of the Jurists:- There is a difference of opinion among the scholars whether unanimity is pre-requisite for Ijma or it may be constituted by majority also. The accepted view is that Ijma constituted by majority is valid but not absolute as Ijma by unanimity.

Ijma of the jurists may be reversed by subsequent Ijma of the same age. Similarly Ijma of one age may be superseded by the Ijma of a subsequent age.

(iii) Ijma of the people:- It is binding if it is with regard to the fundamental observances of Islam as to prayers, fasting, pilgrimage, poor rate etc. But it does not have any value with regard to legal matters because Muslim public at large is not supposed to be well versed in Islamic Jurisprudence.

#### **Al-Qiyas:-**

Imam Shafai, in his magnum opus, Risala observes that Qiyas is nothing but another form of Ijtihad. When he was asked about Qiyas whether it is Ijtihad, or they are two different things? He replied "On all matters touching the life of a Muslim there is either a decision or indication as to the right answer. If there is a decision it should be followed. If there is no indication as to the right answer, it should be sought by Ijtihad and Ijtihad is Qiyas." (17)

The word Qiyas means 'measuring', 'accord', 'equality'. It is an extension of law from the original text to the similar cases by means of Illah which cannot be ascertained merely by interpretation of the language of the text. In other words it is an analogical deduction of effective cause from the revealed laws and then to apply it to the cases which have similar cause. For example, wine drinking is prohibited by the explicit text. The cause for the prohibition is the intoxicating effect, hence in whatever this cause is found prohibition will

become applicable. Similarly the prohibition can be extended to the use of opium also.

In all the cases Qiyas must be on the Qur'an, the Sunnat and the Ijma. In fact, the fundamental idea of Islam is that a perfect law has been given and the Holy Qur'an and Sunnat contain the solution of every problem that can arise. Every law not provided by the Prophet must be deduced analogically. This is for the scholars of Muslim Ummah to exert to find out the law by way of analogical deduction on the basis of common Illah. That is why it is called Al Ijtihad-al-Qiyasi also.

There are four important things which are pre-requisites in the process of Qiyas:

(i) The statement of the problem which has been covered by the Qur'an or the Sunnah of the Prophet.

(ii) The cause must be the idea intended by the Shariah. It should be apparent, complete in itself.

(iii) Existence of a secondary matter (a problem) which has not been covered by the texts. But Illah is identical in both the primary and secondary problem.

(iv) The application of Hukum of the texts to the secondary problem, because of the similarity of Illah in both.

"All the four schools of thought agree that in all matters which have not been provided for by the Qur'an and the Sunnah and not determined by Ijma, the law may be deduced by the use of Qiyas. But the Zahiris, some Hanbalis and Ibn Hazm deny

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the authority of analogy. They contend that any other view of analogy would virtually amount to making laws which is the sole privilege of God." (18)

But this is a wrong view because extension of law by process of analogy does not amount to establishing a new rule of law but helps to discover the law which already exists inherently. The law analogically deduced does not rank as authority, as those laid down by a text of the Qur'an or Hadith. The reason is that analogical deductions are done by the jurists by applying human reason which is likely to err. They cannot be absolutely certain about the intention of Law Giver. Moreover, this is the maxim of Sunni jurisprudence that a jurist may be right or may be wrong." (19)

The appointment of Abu Bakr as Caliph after the death of Prophet is the classical example of Qiyas. "The Prophet's choice of Abu Bakr as spiritual leader to act as an Imam in congregational prayers was the comparative basis for the selection of Abu Bakr as temporal leader. Later the Ijma of the community approved his appointment." (20)

In another case Sayyidna Ali applied the process of Qiyas beautifully. The question arose what punishment should be given to a drunkard? Sayyidna Ali concluded by saying "He who drinks, gets drunk; he who gets drunk, raves; he who raves, accuses people falsely and he who accuses people falsely should be given eighty strokes of cane. Therefore, who drinks should be



given eighty strokes of cane." (21)

### **Masalih-al-Mursalah:**

"The Shariah provides law in three forms: in the form of clear texts, analogous precedents, and indications to the right solutions in the form of guiding principles. There is no vacuum in the Shariah. If there is neither a clear text nor analogous precedent, the legislation must be supported by some argument from the Qur'an and the Sunnah. The third form of Shariah laws falls within the domain of Masalih-al-Mursala." (22)

Emerging from the intense speculation of jurists, Masalih provides classical example for Shariah's beautiful interaction with Fiqh. The etymology of Masalih-al-Mursala makes the concept more clear. "The Arabic term Mursal literally means to set loose from the texts and Masalih means welfare." The word Masalih is the plural of Maslaha which means interest, benefit and when used with Mursalah it means unrestricted, undefined or independent judged interest." (23)

The Masalih-al-Mursalah are not addition to the Shariah which is prohibited by the doctrine of Bidah (Innovation). It is from the Shariah itself and the jurist must establish with the help of sound and objective arguments that they are within the purview of the Shariah. The theory of al-Masalih, al-Mursalah owes its origin to the conception that Shariah is for social utility and its function is to promote

benefits and prevent evils. How does it emerge ? Dr. Muslehuddin writes again "Ijtihad or interpretation of the text, according to this theory, is to consider the underlying or hidden meaning of the revealed texts in the light of the public interest. Qiyas, as we have noticed, is the primary method of tracing the effective cause or Illah of the revealed text to be extended to the cases of similar nature. If the cause is apparent, it will be admittedly extended to similar cases but the difficulty arises when the cause is not apparent. The right guided Caliphs, in such a case, resorted to sound analogy or tawil and tried to discover the cause with reference to the words of the revealed text, meaning implicit therein, context thereof, and the traditions of the Prophet. But the followers of the Malik theory would resort to their method of interpreting the text according to their own reason with regard primarily to social utility. Here is the difference between right guided Caliphs and the use of independent judgement by Malikites. The hidden cause which the later discover by their own reason is but the value judgement known as Hikmah (act of wisdom). Thus they base their analogy or Qiyas on Hikmah which they call the underlying reason of the text, while actually it is their own reason. Illah is thus replaced by Hikmah by the Malikites."<sup>(24)</sup> This is only the difference of terminology and it never goes against the spirit of the Shariah.

"The base of Masalih-al-Mursalah is five principal objects of the Shariah usually called Five Universals or Kulliyat-al-Khams out of which one must be the genus of the Masalih-al-Mursalah. They are: Protection of religion, protection of life, protection of reason, protection of lineage and protection of property. Some later jurists have made the addition of protection of prestige." (25) The concept of public utility dominates the theory of Masalih. The law can be devised even in the absence of any direct hint from the Shariah but with the intention to achieve the five objects of the Shariah. This is what the al-Masalih-al-Mursalah is.

It is a form of Ijtihad, whose authority is even lesser than the Qiyasi legislation. Mustafa Zarqa says: "the concept of Masalih-al-Mursalah should be called General Analogy: Al-Qiyas-al-Aam. And the Hanbalite jurists hold that this concept is a kind of Qiyas." (26)

The example given below fully clarifies the true position of Masalih:

(i) The imposition of taxes on the rich in order to meet the costs of the army and to protect the realm.

(ii) The punishment of the criminal by depriving him of property if his crime was perpetrated over that property or its equivalent.

(iii) If the infidels in a war should shield themselves in their advance by Muslim prisoners of war, public

interest permits the killing of Muslim prisoners of war in the course of fighting the infidels, if such action should be found essential to contain and ward off the foe and to protect the interests of the Muslim people as a whole." (27)

**Istihsan or Juristic Equity:-** Istihsan, literally means, preferring or considering a thing to be good. Sir Abdul Rahim translated it as juristic preference or equity. It is admitted principle of all Sunnis that if Qiyas is inconsistent with the Qur'an or precepts of Prophet, it will be set aside. Abu Hinifa has taken a step further, according to him when a deduction based on analogy is not acceptable either because it is against the broader rules of justice, or because it is not in the interest of the public good. And it is likely to cause hardship to them to whom it is applied, the jurist is at the liberty to reject the same, and to adopt instead a rule which is conducive to public good, or is in consonance with the broader rules of justice. This is Istihsan or juristic equity which is quite in accordance with the spirit of the Qur'an or the Hadith and a peculiar principle developed by Hanafi School. In this method, there is less liability of error comparing to analogy. In the system of Imam Malik, similar rule is adopted under the name of Istislah which means a deduction of law based on considerations of public good. Hanafi Jurists say it hidden analogy. Nevertheless Istihsan as a source of law is wider in scope than analogy.

Istihsan is chiefly resorted to, in cases arising out of the complex conditions of a growing society where a strict adherence to analogy would fail to meet the wants of the people. Some important branches of Muslim law owe their origin to it.

**Istislah:-** Istislah means a deduction of law based on consideration of public good or public welfare. Imam Malik sanctioned this doctrine which is similar to juristic equity. He would allow a deduction of law to be based on general considerations of the public good. Hanafi jurists and some Maliki jurists consider the doctrine to be vague and general to be useful in making legal deductions.

**Istidlal:-** Istidlal signifies the inferring of one thing from another. Hanafi jurists use it in connection with the rules of interpretation. According to Malikis and Shafais Istidlal is the name for a distinct method of juristic ratiocination, not falling within the scope for interpretation or analogy.

The two important sources of Istidlal are customs and usages and the laws of religions revealed before Islam. It is recognised that customs and usages which prevailed in Arabia at the advent of Islam, and which were not abrogated by Islam, have the force of law. On the same principle, customs and usages prevailing anywhere, when not opposed to the spirits of the Qur'anic teachings or not expressly forbidden by the Qur'anic teachings would be admissible, because, according to a well

known maxim of the jurists "permissibility is the original principle". Istidlal as a method of juristic deduction includes all forms of ratiocination which do not fall within the scope of analogical deduction. Hanafi doctrine of Istihsan and Maliki doctrine of Istislah are also covered by Istidlal.

**Footnotes:-**

- (1) Hasan, Ahmad: The Early Development of Islamic Jurisprudence, 1 (Islamabad, 1970)
- (2) Ramdan, Said: Islamic Law: Its Scope and Equity, 84 (Geneva, 1970)
- (3) Op.cit. 1 at 1
- (4) The Holy Qur'an, 33:30
- (5) Gilani, R.H: The Reconstruction of Legal Thoughts in Islam, 110, 111 (Delhi, 1982)
- (6) Id at 115
- (7) The Holy Qur'an, 29:69
- (8) Asad, Muhammad: The Principles of State and Government in Islam, 25 (University of California Press, 1961)
- (9) Sahih Muslim: Translated by Abdul Hamid Siddiqui. (Kitab Bhavan, New Delhi, 1978)
- (10) Iqbal, Muhammad: The Reconstruction of Religious Thoughts in Islam, 148 (Lahore, 1989)
- (11) Op.cit. 1 at 155
- (12) The Holy Qur'an, 4:59
- (13) Id at 4:115
- (14) At Trimidhi on the authority of Abd Allah Ibn Umar
- (15) Ahmad Ibn Hanbal; on the authority of Muad Ibn Jabal
- (16) Ibn Majah: On the authority of Abd Allah Ibn Umar
- (17) Khadduri, Majid: Islamic Jurisprudence, Shafii's Risala, 288 (Baltimore, 1961)
- (18) Rahim, Abdul; Muhammadan Jurisprudence, 91 (Allahabad)
- (19) Muslehuddin, M: Philosophy of Islamic Law and the Orientalists, 140 (Delhi, 1989)
- (20) Doie, Abdur Rahman: Shariah: The Islamic Law, 73 (Kuala Lumpur, 1984)

(21) Ibid

(22) Op.cit.5 at 169

(23) Op.cit.19 at 156

(24) Id at 157

(25) Op.cit.5 at 171

(26) Id at 170

(27) Op.cit.19 at 162



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### Chapter III Emergence of Schools and Doctrine of Taqleed

#### The Emergence of Schools of Thought

"The difference of opinion in my community is (a sign of divine) mercy." (1)

Therefore differences of opinion in Islamic community among jurists in matters of law developed various schools of Islamic jurisprudence. These schools are considered as the various paths or roads of the Shariah, the source of Islamic learning. Islamic legal system is not rigid but has a flexibility and it is represented in the saying of Holy Prophet. The schools of Islamic law may utilise the flexibility of Islamic system in order to remove the rigidity of any specific school, without parting with the fundamental principles of Islamic law. The Muslims of different regions adopted different schools due to socio political situations; only in the medieval ages the concept of the official schools of Islamic law emerged.

Sir Abdul Rahim divided the growth of schools of thoughts and formation of Islamic jurisprudence into four periods in his famous book Muhammadan Jurisprudence. (2) The first period commenced with the Hijrat or retirement of the Prophet to Madina (A.D. 622) and ended with his death (A.D. 632). This has been rightly called the legislative period of Islam when laws were enacted by the divine legislator and promulgated in the words of the Qur'an, or by the precepts of Holy Prophet. These are the texts upon which the superstructure

of the four Sunni schools has been constructed.

The second period extends from the date of the Prophet's death to the foundation of different Schools of Jurisprudence, and would cover the time of the companions of the Prophet and their successors. When Prophet died (June A.D. 632), the task of the spiritual and wordly government of Muslim Commonwealth devolved of his companions, and a new era commenced in the history of Muslim Jurisprudence. He being the last of the Prophets, there was no longer anyone through whom God could promulgate. If a text of the Qur'an or pronouncement of Prophet covered a point, or if the Prophet had decided a similar case, there could be no difficulty. But fresh facts and new circumstances often arose for which no provisions had been made, specially as the affairs of the community became more complex with the growth of empire. In the absence of authority, the companions had to guide themselves by the light of their reason, having in regard those usages of community which had not been condemned by the Prophet. The companions knew the policy of Islamic law as they had been in the company of Holy Prophet and shared his counsels.

The third period was marked by a theoretical and scientific study of law and religion, and it was then that the four Sunni Schools of Jurisprudence were established. The principles of these four ~~Schools~~ are substantially the same, and they differ from each other merely in matters of detail. The

process of formation of Schools commenced about the beginning of the second century of the Hijra and practically ended with the third century. Many schools came into being in this period but only four schools gained prominence in the Sunni World namely Hanafi, Shafi, Maliki and Hanbali. The emergence of these schools is a significant event in the history of the Islamic Jurisprudence. Firstly it enabled multitudes with complex social needs to practise the Shariah. Secondly, the scholars of these schools produced hundreds and thousands of original works of Islamic Jurisprudence which contributed enormously to the development of Islamic Legal thought. Thirdly, this shows the hollowness of the assertion of the orientalist that there is no room for human reason in the spectrum of the Shariah.

The fourth period was started after the close of third century of the Hijra. Since then there has been no independent exposition of Muslim law, and jurists have been engaged within the limits of each School to develop the work of its founders both in the domain of material and theoretical science of law. As regards the former they devoted their attention to concrete questions, which had not been dealt with by the founders of different Schools and their immediate disciples, and to the collection and arrangement of the opinions of the masters. This fourth period in the history of Muslim law cannot properly be said to have yet come to an end.

The establishment of Schools was necessitated by a lot of reasons. During the life of the Holy Messenger, he stood as the radiant light; people could approach him and solve all their problems in the light of Prophetic guidance. After his death this vacuum was filled by his companions who had got training directly from the Holy Prophet. But later the events unfolded fast as the ~~Islamic~~ empire was expanding and people of different cultural and religious backgrounds were falling into the folds of Islam at the high speed. The rulers at that time were not so pious in their thoughts and actions as the pious Caliphs. But there were some original scholars in Hijaz, Syria, Kufa and Baghdad with unqualified dedication to all that Islam stood for. When they appeared on the scene, they got following all over the Islamic world. From the towns of Hijaz and Iraq these centres of learning enlarged into fullfledged Schools of law connecting people from the every corner of the world. By the end of the 4 A.H. four Schools gained prominence in the Sunni World namely Hanafi, Shafii, Maliki and Hanbali.

#### **Hanafi School:-**

The founding father of this School is al-Numan b. Thabit b. Zuta Abu Hanifa. He was born in 80 Hijrah at Basra. But he spent the greater part of his life at Kufa. He first studied scholastic divinity but soon abandoned it in favour of jurisprudence. He got his early education in Ilm-ul-Kalam under

the guidance of Shaykh Hammad b. Abu Sulaiman. Later he studied the Qur'an, Hadith, logic, Fiqh etc. from the learning centres like Ab Ishaq Sabi, Salamah bin Kunhail Manarib bin Dithar, Qatadah etc. Besides he attended the lecture of Jafar as-Sadiq and of Hammad. Jafar as-Sadiq, a descendent of the Prophet, was noted for his great learning and piety and is regarded as an Imam of the Shia School, whereas Hammad was a jurist of very high reputation.

"Imam Abu Hanifa was endowed with talents of an exceptional nature and had the true lawyer's gift of detecting nice distinction. He possessed remarkable powers of reasoning and deduction, which, combined with the resources of a retentive memory and a clear understanding, brought him into rapid prominence as a master of Jurisprudence."<sup>(3)</sup> According to Ibn Nadim's al-Fihrist, the great Imam wrote the following books: al-Fiqhal-Akbar al-Alim Wal-Mutaalim, a Risala written to Uthman, and Kitab Radd'a laal Qadiriyyah, Musnad, some other works as mentioned by other authorities: Kitab al-Ray, Ikhtilaf al Sahabah, Kitab al Sirr, Kitab al -Awasat, al-Jami.

"He was the founder and teacher of the body of legists known as the Jurists of Iraq". He also instituted, it is said, a committee consisting of forty men from among his principal disciples for the codification of laws. Of this committee Yahya Ibn Abi Zaid, Hafs Ibn Ghiyath, Abu Yusuf, Daud at-Tai, Habban and Mandal were men of great reputation as

traditionists, Zufar was noted for his power of deducing rules of law and Qasim Ibn Nuim and Muhammad were great Arabic scholars. The committee used to discuss any practical and theoretical question that arose or suggested itself, and ~~conclusions which they agreed upon~~ after a full and free debate were duly recorded. It took thirty years for the code to be completed, but each part as it was finished was circulated broadcast. The entire code, however, has now been lost, an irreparable loss no doubt to the cause of Muhammadan Jurisprudence." (4)

Abu Hanifa and his disciples were famous for their stress on human reason for the application of Islamic Shariah, to the practical problems of human life. This earned them the title Ahlul Ray (the companions of opinion). Besides Abu Hanifa was very strict in testing the veracity of Ahadith. He was considered by his contemporaries to rely less upon the traditions in arriving at legal conclusions and more upon the deductions. In fact, in his time, the jurists were broadly divided into two categories; those of Hijaz who were called 'the upholders of the traditions' and those of Iraq who were known as 'upholders of private opinion'. But in case of Abu Hanifa it can not be said that he stood for the reason for its own sake. What he tried was to ~~reach~~ a conclusion through Ijtihad, if the Qur'an, the Sunnah and Ijma of the companions was not available on a particular topic. It cannot be supposed that Abu Hanifa did

not regard the Ahadith as a legitimate source of law or lacked a sufficient knowledge of Ahadith. But this is the fact that he accepted only a small number of Ahadith because of the severity of test he applied.

On his second visit to Medina he met Imam Baqir, when he was introduced to Imam Baqir, the latter addressed him in these words: "So it is you who contradicts the traditions of my grandfather on the basis of Qiyas". Abu Hanifa said "May Allah forbid, who dare to contradict the Hadith ? After you sit down sir, I shall explain my position." Abu Hanifa asked:

"Who is the weaker, man or woman" ?

"Woman", replied Imam Baqir

Abu Hanifa, "Which of them is entitled to the larger share in the inheritance" ?

Imam Baqir: "The man"

Abu Baqir: "Now if I had been making more deductions through analogy, I should have said that the woman should get the larger share, because on the face of it, the weaker one is entitled to more consideration".

"But I have not said so". (5)

This conversation explains itself the position of Abu Hanifa. He, no doubt, was esteemed as a great master in Qiyas. He was the first to ~~give prominence~~ to the doctrine of Qiyas, though as a principle of law, it was in practical operation before his time. The great Imam died in 150 A.H. and

after his death two of his most important disciples, namely, Imam Abu Yusuf and Imam Muhammad developed his teachings and contributed much to its influence.

The main feature of his School are: (6)

- (i) Less reliance on traditions unless their authority is beyond any doubt; ✓
- (ii) Greater reliance on Qiyas; ✓
- (iii) A little extension of the scope of Ijma; and
- (iv) Evolving the doctrine of Istihsan i.e. applying a rule of law as the special circumstances required.

#### **Maliki School:**

"Malik Ibn Anas, the founder of this School, was born in 93 A.H. at Madina, which was regarded as the home of traditional learning. Imam Malik studied and taught and did all his work in the sacred city and became master in the field of Ahadith and Science of the Qur'an. Prominent among his teachers were Abu Rahim Nafi bin Abdal-Rahman Nafi, Jafar al-Sadiq. Muhammad Ibn Yahya Al-Ansari, Hisham Bin Urwah." (7) Malik was not only a traditionalist but a jurist also but he leaned more upon traditions and the usages of the Prophet and the precedents established by his companions. He upheld the exercise of judgement when the other sources did not throw any light on a particular matter.

Imam Malik was mainly concerned with simple problems of life because life in Medina was simple unlike of Kufa. He



could solve these problems in the light of Qur'an and the Sunnah of Holy Prophet and of his companions, so he did not give much importance to the principle of Qiyas. He was better acquainted with the laws as laid down by the companions and their successors, so he embodied them largely in his system. But this was strongly refuted by the Kufan scholars. As death approached, his one fear was lest he should have exercised his private judgment in delivering any legal opinion. In his last illness a friend went to visit him, and enquiring why he wept, received the following answer: "Why should I not weep, and who has more right to weep than I ? By Allah! I wish I had been flogged and reflogged for every question of law on which I pronounced an opinion founded on my own private judgement." (8)

The treatise composed by him " Al- Muwatta" or "The Beaten Path" is a classical work on Hadith. Imam Shafai is reported to have said about Muwatta " There has never appeared on earth a Book that is more close to the Qur'an than the Book of Malik." (9) Apart from the three hundred Ahadith this book contains the legal maxims and opinions delivered by the companions. His system of jurisprudence has been described by some scholars as historical and traditional. To the four main sources of law, the Qur'an, the Hadith, Ijma and analogical deduction he would add Istadlal as a fifth source of law. He recognised the principle of Al Masalih al Mursalah, corresponding to that of Abu Hanifa's Istihsan.

Imam Malik died at the age of eighty two in 172 A.H. in Medina. The most important and notable of his disciples is Imam Ash-Shafii. Imam Muhammad also, the disciple of Imam Abu Hanifa, studied traditions under him for three years.

The main characteristics of this School are as follows:—(10)

(i) Acceptance of traditions which were, in the opinion of Imam Malik authentic, even if the Tradition carried the authority of one narrator.

(ii) Acceptance of the practices of the people of Madina and of the sayings of the Companions of the Prophet.

(iii) Resource to analogy (Qiyas) only in the absence of an explicit text. ✓

(iv) Making use of a source unique to this school, known as al-Masalih al-Mursalah. ✓

#### **Shafii School:—**

Imam Muhammad Idris Ash-Shafii, was born in Gaza, a town in Palestine in A.H. 150. He was a member of Quraish tribe as being descended from Abdul Muttalib, the grandfather of the Prophet. When he was ten years old, his mother brought him to Mecca where he studied the Qur'an and Ahadith under the guidance of Muslim bin Khalid al-Zanji and Sufyan bin Uyana. At an early age he evinced proofs of great talents and memorised the Qur'an and Muwatta of Imam Malik by heart. Then he went to Madina and

became the student of Imam Malik where he got the opportunity to study the Malik Fiqh. Having studied the Malik Fiqh he reached Baghdad in A.H. 187 and met Imam Mohammad and under his guidance He studied Hanafi Fiqh throughly. Imam Shafii held lengthy discussions with the Iraqi and Medanese jurists and differed from them on a number of problems. He felt inconsistency in their reasoning. Previously he considered himself as the member of Maliki School but later he became free from School bias.

Having carefully studied the systems of the two preceding Imams, he then proceeded on an eclectic system to form his own. He finally settled down in Cairo in the year A.H. 188 and expounded his teachings and became the founder of third School. He tried to achieve the harmony between the Hanafi's over reliance on the reason and Maliki stress on the traditions of Medina. He examined the traditions more critically and made more use of analogy than Imam Malik. But as he was against the over stress on reason so he rejected Abu Hanifa's principle of Istihsan. He was the first to write the treatise on Usul or principles. He formulated the principle of jurisprudence in his magnum opus, Kittab al-Risalah. He died in Cairo in the year A.H. 198. His most famous disciple was Imam Ahmad ibn Hanbal.

He attained even greater eminence as a jurist than his teacher Imam Malik. The school of law with which his name associated is, in fact, a beautiful and harmonious combination of Hanafi and Maliki Fiqh. The main features of Shafaii School

can be summarised in the following words:-

(i) This school was a compromise between Hanafi and Maliki School; Neither over reliance on reason nor over stress on the traditions.

(ii) Imam Shafii would accept sources of law: the Qur'an, the Sunnah, Ijma and Qiyas. He would accept Istidlal also as a source of law.

(iii) He rejected what the Hanafi school called Istihsan and what the maliki school called al Masalih al-Mursalah.

#### **Hanbali School:**

"Imam Abu Abdallah Ahmad bin Muhammad bin Hanbal was born at Marw in Iraq in the year A.H.164. The fourth and latest Sunni School of law was named after him. He studied under different masters, some of his illustrious teachers were Imam Shafai, Jarir bin Abdul Hamid, Waki ibn al Jarrah, Abd Allah ibn Namir and Bashir bin al-Mafaddal. His system was a distinct return to traditionalism. For him theological truth could not be reached by reasoning (Aql); tradition (Naql) from the fathers was the only ground on which the dubious words of Qur'an could be explained"<sup>(11)</sup> Infact jurists consider him more of a Muhadith than of Faqih as he was more learned in the traditions than in the science of law. "It is said that he became such a great scholar of Hadith that he remembered almost a million Ahadith".

From the very beginning Imam Hanbal based his judicial thoughts on Hadith, for him even single authority Hadith had preference over pure reasoning. His interpretation of Ahadith was literal and unbending and that is why he allowed a very narrow margin to the doctrines agreement and analogy. He did not attach any special importance to Hadith of any particular place as Malik used to attach with the Ahadith of Medina. He accepted the Hadith wherever it was found, provided it was authentic according to his test.

His famous book Musnadul Imam Hanbal, which is the collection of 50,000 Ahadith is regarded as one of the authentic works on Ahadith. His famous students were Imam Muslim, Imam Bukhari and Abu Daud.

He was a man of great piety and uncompromising opinions. He adhered to his own views and refused to conform to those that had found favour in court. For this reason he was severely persecuted by Khalifa al-Mamun. The jurists at the court were followers of Abu Hanifa. They carried the principle of analogical deduction to dangerous lengths. Imam Hanbal opposed their deviated views and this resulted into the severe persecution. He died in the year A.H. 221. The foundation of this School rests on five main sources: (12)

- (1) The Qur'an.
- (2) The Sunnah.
- (3) The Ijma of the Companions of the Prophet, if

there was nothing to contradict them, and the sayings of certain of the Companions when they were consistent with the Qur'an and Sunnah.

(4) Zaif and Mursal traditions i.e. traditions having a weak chain of transmission, and lacking in the names of some of the transmitters; and

(5) Qiyas, whenever it was necessary.

#### **Doctrine of Taqleed:**

With the emergence of four Sunni Schools of law the concept of Taqleed came into being in its present form i.e. the blind adherence of any of the four schools. The bigoted spirits among the Sunnis require that a Muslim should attach himself to one or the other of the four schools if he is not to be regarded as outside the pale of Sunni orthodoxy. When one attaches himself to one of the schools, he is bound to follow the Fiqh of that school in letters and spirits. Practically, the Muslims adhere the school which their ancestors adhered, it is not a matter of choice. Those who do not follow any of the schools, they are called Ghairu Muqallids or "Men who do not follow" in distinction to the Muqallids or "those who follow". Here the word follow connotes to follow the Sunni Schools.

Taqleed is as much the part and parcel of Islamic Shariah as Ijtihad. The existence of this doctrine cannot be attributed to the emergence of Schools. It was very much in

existence during the lifetime of Holy Prophet but with the emergence of schools its meaning got changed entirely. The matters which are axiomatic in Shariah do not require any Ijtihad but the matters which are not explicitly covered by the texts, require Ijtihad which can only be done by the competent jurists. The persons who do not possess adequate knowledge of Islamic Shariah are bound to follow the opinion and judgement of the Mujtahid. Ijtihad is the duty of the jurists but Taqleed the duty of laymen and at the same time it is an administrative necessity also. The doctrine of Taqleed is not of general application but it is limited only to those who do not possess the qualification of a jurist. Taqleed is not obligatory upon the person who himself is jurist.

The most outstanding Hadith regarding Ijtihad is of Muad Ibn Jabal who was authorised by the Prophet to do Ijtihad for the people of Yemen. The doctrine of Taqleed is implied in the same Hadith because at the same time the people of Yemen were bound to follow the Ijtihad of Muad. The doctrine of Ijtihad makes adherence obligatory to the established authority.

After the emergence of four Schools of law the concept of Taqleed unfolded in a very negative manner. People used to associate themselves with one or the other School and started following the thoughts of these early doctors blindly. Both the jurists and layman accorded universality and infallibility to the thoughts of these early doctors ignoring

the fallibility and limitations of human wisdom. No doubt, the founders of these Schools were great Mujtahids and men of great piety and probity but after all they were human beings and they had not been accorded any special status by the Prophet or Holy Qur'an. They tried to see the Shariah in the light of Shariah but their thinking was influenced by their time, place, personal and theological orientations. The result was divergence of opinions and contradicting Fiqhs to which the people of that particular School followed blindly. Although the great Imams were against this blind imitation which is clear in their teachings. Dr. Muslehuddin reports the statements of Imams in his book. (13) Imam Abu Hanifa and Abu Yusuf are reported by Ibn Qayyim al Jawziah to have said, "It is not legitimate for anyone to follow our views until he has learned the sources whereupon we derived those views."

It is reported that Mad ibn Isa heard Malik say, "I am but human being who is capable of right and error. Consider my views carefully; whatever is compatible with the Qur'an and the Sunnah, accept it; whatever is in conflict with the Qur'an and the Sunnah set it aside". It was the basis of this conviction that Malik warned the Caliph Harun al-Rashid against imposing the Malik school on the people.

Shafii said, "If you come across a statement by me which runs counter to a statement by the Prophet, then follow the Prophet's statement and do not immitate me. Similarly if an



authentic tradition conflicts my school, then follow the former and know that it is my school".

Finally Ahmad ibn Hanbal, reputedly the most meticulous adherent to the traditions and a foe of opinion said, 'Do not immitate me, Malik, al-Shafii or Al-Thawri, but learn from the sources from which they learned.'

It becomes abundantly clear from the above statements that all the great Imams were against the blind following. But so far as the blind Taqleed is concerned it was not a sheer incident that it came into being. There were solid reasons behind it when the scholars declared that the door of Ijtihad had been closed and Taqleed of any of the Schools became obligatory upon the Muslims. Allama Iqbal enumerates those reasons in his book 'Reconstruction of Religious thoughts in Islam'. (14)

(1) During the early days of Abbasids The Rationalists raised the bitter controversy denying the dogma of the eternity of the Qur'an. The conservatives took it as undermining the very foundations of Muslim Society. The differences between the two camps grew farther apart in the nature of their convictions. The conservative thinkers considered the Rationalist movement as a force of disintegration and considered it a danger to the stability of Islam as a social polity. The main purpose, therefore, was to preserve the social integrity of Islam, and to realize this the only course open to conservatives was to

utilize the binding force of Shariah and to make the structure of their legal system as rigorous as possible.

(2) The rise and growth of ascetic Sufism, which gradually developed under influences of a non Islamic character, a purely speculative side, is to a large extent responsible for this attitude. On its purely religious side Sufism fostered a kind of revolt against the verbal quibbles of our early doctors. Sufism with its spirit of total other worldliness not only absorbed the best Muslim minds, like of Sufyan Thauri, to whom unrestrained speculation appealed greatly, but further obscured from men's vision the very important aspect of Islam as a social polity. The Muslim state was thus left generally in the hands of intellectual mediocrities, and the unthinking masses of Islam, having no personalities of higher calibre to guide them, found their security only blindly following the Schools.

(3) On the top of all this came the destruction of Baghdad—the centre of Muslim intellectual life—in the middle of thirteenth century. This was indeed a great blow, and all the contemporary historians of the invasions of Tartars describe the havoc of Baghdad with a half suppressed pessimism about the future of Islam. For fear of further disintegration, which is only natural in such a period of political decay, the conservative thinkers of Islam focused all their efforts on the one point of preserving a uniform social life for the people by a jealous exclusion of all innovations in the law of Shariah as expounded

by the early doctors of Islam.

As the door of Ijtihad was closed down and it was declared that the principles laid down in the four Schools are sufficiently enough to meet the future need of society. People started to follow the Schools blindly and the jurists of later period exercised the Ijtihad within the parameter of a particular school, which caused the cultural and legal unproductivity and reduced the Law of Islam to a state of immobility. As a result of this creativity and fresh discoveries disappeared in almost all the sectors of Islam.

Allama Iqbal says "the theoretical possibility of Ijtihad is admitted by the Sunnis, but in practice it has always been denied ever since the establishment of the Schools."<sup>(15)</sup> In spite of this a number of scholars of high calibre appeared from time to time, who strongly refuted blind imitation and legal dogmatism. A Hanbali scholar Ibn Taimiyyah, claiming freedom of Ijtihad for himself, rose in revolt against the finality of Schools and went back to first principles in order to make a fresh start. During the fifth century Ibn Hazm of Cordova opposed the arbitrary amplification of the Shariah through legal deductions and upheld the pristine clarity of the Shariah. Getting inspiration from them Muhammad Ibn Abd al-Wahab argued for more enlarged Ijtihad and he spread the fire of his restless soul throughout the whole World of Islam. In the present century Hasan al-Banna and Syed Qutb of Egypt and Abul A'la Maudoodi of

Indo-Pak subcontinent led another pro-Ijtihad movement which stressed mainly the political and social emancipation of the Ummah. The scholars, who stood for the revival of Ijtihad, failed to understand the intensity of reverence with which the Muslims viewed the ~~classical~~ Imams and their Schools when some of the upholders of Ijtihad came with total revolutionary idea of undoing the entire Fiqh, it was unbearable to the Muslim masses, that is why they could not succeed to the greater extent.

As mentioned before that Taqleed is an administrative necessity and it is obligatory on those who do not possess the qualification of jurists. But Taqleed in its present form is the mother of restrictive rigidity and immobility which we see at present in the structure of Islam.

**Footnates:-**

- (1) Asad, Muhammad: The Principles of State and Government in Islam, 48 (University of California Press, 1961)
- (2) Rahim, Abdul: Muhammadan Jurisprudence, 11 (Allahabad)
- (3) Id at 16
- (4) Id at 17
- (5) Doie, Abdur Rahman: Shariah: The Islamic Law, 90-91 (Kuala Lumpur, 1984)
- (6) Rashid, S. Khalid: Muslim Law, 20 (Lucknow, 1985)
- (7) Op.cit.5 at 95-96
- (8) Sell, R. Edward: The Faith of Islam, 33 (Delhi, 1982)
- (9) Op.cit.5 at 102
- (10) Op.cit.6 at 21
- (11) MacDonald: Muslim Theology, 157
- (12) Op.cit.6 at 21
- (13) Muslehuddin, M: Philosophy of Islamic Law and the Orientalists, 143 (Delhi, 1982)
- (14) Iqbal, Muhammad: The Reconstruction of Religious Thoughts in Islam, 118-120 (Lahore, 1989)
- (15) Ibid

#### CHPATER-IV

#### **Dynamism of the Shariah**

There are two basic realities; firstly the finality of Islamic Shariah with the death of Holy Prophet and secondly the ever recurring changes in the society. The question arises whether the Shariah, which was given to the mankind before fourteen hundred years ago is capable to guide the mankind and to solve the problems which the humanity is confronting now? The orientalists allege that since the Shariah is unamendable and unchangeable, it is dogmatic and rigid and refuses to accomodate the changes and progress of the society. It is entirely a superficial view and the result of wrong notion of the Shariah. This allegation has serious implications: blindly following of Shariah makes the man a mechanical figure devoid of intellectual creativity. But this is not so with the Shariah. It is, of course, rigid but at the same time it is flexible also. The doctrinal aspect of the Shariah is rigid but it carries the seed of dynamism which makes it adaptable in every society. The Shariah evolves general principles leaving the particularities to human wisdom. The general principles or the outline of the Shariah is rigid but so far as the particularities are concerned they are very much flexible and can be moulded in accordance with the need of society and demand of time. God has given the clear Shariah but that does not mean that He wants the man working like a machine. God has, in fact,

fixed a circle for the proper exercise of man's activities. In other words the Shariah draws inflexible outline for its flexible concepts. Shariah avoids both self destructive rigidity and uncontrolled flexibility. This harmonization of two diametrically opposite concepts (rigidity and flexibility) is, in fact, the beauty of the Shariah.

Since the Shariah emerges from the all encompassing knowledge of God, it is infallible and unchangeable. The rigidity which appears in a superficial view is not dogmatic as understood with immobility and lack of dynamism. There are some basic principles in the Qur'an and Sunnah on which the entire structure of Islam has been built. These principles are rigid and solid which are the essence of Islam: Tawheed, Risalat, Akhirat, Hal, Zakat, Salat (canonical prayers), Saum (fasting) etc. All these ideas have ~~deep~~ metaphysical connotations which are entirely beyond the human perception. So the Shariah does not give any room for human reason in these fields.

Said Ramadan rightly says "thus there should always be some inflexible outlines of flexibility."<sup>(1)</sup> The Nusus of the Qur'an and Sunnah draws the inflexible outlines for the creativity and activity of ~~human~~ being. But at no point of time these Nusus act as stumbling block in the path of constructive thinking and flexibility, rather these make the structure of Islam strong by opening the door to positive and harmless flexibility. The Qur'an and Sunnah stand neither for dogmatic

ideology nor destructive flexibility. The supreme duty of every believer is to follow God and the Prophet, when one thing has been clearly decided by God and His Messenger, a believer has no option but to obey it. Holy Prophet says:

"He who did something which is not based on our authority should be condemned" (2)

The doctrinal aspect of the Shariah which can rightly be called rigid is essential for making the human actions and thoughts collective. It is not to crush the individual freedom but to create a constructive atmosphere for the development of mankind.

#### **Theoretical exposition of the Shariah's dynamism:-**

The Holy Qur'an and the Sunnah of Holy Prophet himself speaks of the dynamics of Shariah. Holy Qur'an has laid down normative principles on many places giving freedom to the Muslims to lay down the operational principles. Moreover, the famous interview of Muad Ibn Jabal with the Holy Prophet opens the door of Ijtihad which is clearly the sign of the Shariah's dynamism. Dynamism starts from flexibility which in turn comes from ideological broadness. In Islam there is an ample scope of it which gives a large amount of freedom in the practical field to the human beings. The following examples from the Holy Qur'an and Sunnah will make clear the scope of flexibility in the Shariah.



"Those listen to word and follow the best (meaning in it). Those are the ones whom Allah has guided and those are the ones endued with understanding". (3)

"This is the book which we have revealed to thee, full of blessings that they may reflect over its verses and that those gifted with understanding may take head". (4)

"And we have sent down to you the Reminder that you may explain to mankind that has been sent down to them, and that they may reflect." (5)

"Verily, God does not change man's condition unless they change their inner-selves." (6)

In all these verses, the Holy Qur'an addresses the human intellect and reason. It urges man to reflect over the verses of the Qur'an in order to make distinction between truth and falsehood and to carve the way within the four walls of the Shariah. Flexibility is essential for thinking process which gives birth to the new ideas. Holy Prophet said:-

"Diversity of opinion among the learned of my community is the blessing of God." (7)

"If a Judge interprets and gives a right judgement, he will have earned two rewards. If he interprets but errs in his judgement, he will have earned one reward." (8)

From these two Ahadith the scope of flexibility becomes abundantly clear. Diversity of opinion, which the Prophet says the blessing of God, is only possible when there is

a freedom of thought. And in the second Hadith a Judge gets one reward even when he errors in the judgement. It clearly repudiates the dogmatic rigidity. In Islam the freedom is given within the four walls of the Shariah which lays down the inflexible outlines for flexibility. The freedom is not full and absolute because the absolute freedom breeds ideological confusions, divisions and polemics.

### Role of Ijtihad

Allama Iqbal names Ijtihad as the principle of movement in the structure of Islam. He describes it in the following words: "The word Ijtihad literally means to exert. In the terminology of Islamic law it means to exert with a view to form an independent judgement on a legal question. The idea, I believe, has its origin in a well known verse of the Qur'an - "And to those who exert We show our path." We find it more definitely adumbrated in a tradition of the Holy Prophet. When Muadh was appointed ruler of Yemen, the Prophet is reported to have asked him as to how he would decide matters coming up before him. "I will judge matters according to the Book of God," said Muadh. "But if the Book of God contains nothing to guide you?" "Then I will act on the precedents of the Prophet of God." "But if the precedent fails?" "Then I will exert to form my own judgement" (9)

It becomes clear from the Qur'anic verse and Hadith quoted by Allama Iqbal that there is an ample scope of human wisdom to devise laws in the absence of direct injunctions from the Shariah. Shariah, infact, is in harmony with the forward movement of time and Ijtihad is its agent which enables it to adapt to and improve according to the advance of time. So far as pure individual devotional matters (Ibadat) are concerned they have been decided once for all and the need of Ijtihad seldom arises. But regarding the social affairs (Muamalat) Ijtihad is not only allowed but the necessity in the developing society and changing time when the Qur'an and Sunnah do not provide clearcut guidelines.

Ijtihad is dominantly present in every secondary source of Islamic law. It is the basic process of exercise which decides the nature of secondary source. that is why it is called as the mother of all ~~secondary~~ sources. The secondary sources Ijma, Qiyas, Masalih etc. are the offshoots of the Shariah which devise new laws in the changed society while taking inspiration from the Qur'an and Sunnah.

During the lifetime of Holy Prophet Muslim Ummah did not feel very much the need of any kind of Ijtihad because as the propounder of the Shariah (Holy Prophet) could answer directly to their legal complexities but at the same time Prophet through his conversation with Maradh bin Jabal had given permission to individual efforts in the absence of his guidance.

Later, first to fourth countries, jurists of Islam faced different problems. There was no way for them other than interpreting the law and constructing their own Schools of law. No doubt these schools are based on the Shariah but they are not the Shariah itself. The mutual contradictions between these schools eloquently prove this fact. The founders of Schools approached legal problems in different ways. Some of them gave more importance to Qiyas whereas some denied Qiyas altogether. In the case of Masalih, Istihsan, Istidal etc. even the four classical Schools differ at large scale.

Looking at the meritorious aspect of these developments it can be said that it opened the door of creativity. Besides it enabled multitudes with complex social needs to practice the Shariah. The works of the great jurists contributed a lot in the development of Islamic Jurisprudence but this legal advancement was shortlived. Later things moved in the opposite direction as the people started considering as if they were the real Shariah. This was a great aberration. Unknowingly they mixed infalliable and unchangeable Divine will with perishable and falliable human wisdom. The practical result was the closing of the door of Ijtihad, putting it differently the emergence of Taqleed i.e. slavish adherence of the jurists of the past. Creativity was replaced by this slavish adherence. All points of the Shariah which stood for dynamism and creativity turned into the foundation of dogmatism and rigidity.

### Doctrine of Necessity and Need:-

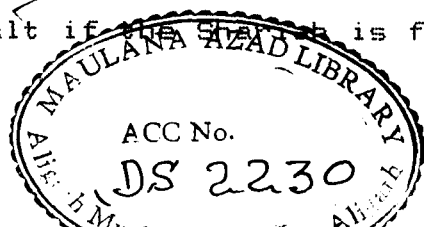
This is another example of Shariah's adaptability when there is no wrong if one commits sin out of compulsions. This doctrine takes cognizance of the genuine needs of society and provides facilities to those who are confronted with hardships. The Law Giver is fully aware of the human nature and its compulsions. That is why He has allowed the deviation from the Shariah during the time of compulsion or duress. The Holy Qur'an says:-

"God does not burden any human being with more than he is able to bear"(10)

The Holy Qur'an further illustrates the application of this doctrine in the clear words when it says:-

"He has forbidden to you only carrion, and blood, and the flesh of swine, and that over which any name other than God's has been invoked, but if one is driven by necessity neither carving nor exceeding his immediate need no sin shall be upon him; for, behold, God is much forgiving, a dispenser of a grace"(11)

The carrion, the blood and the flesh of swine have been clearly declared Haram by the Shariah for the believers but when the necessity arises out of compulsion or duress, even these Haram things are also permitted. This is not the breach of the Shariah but simply a deviation from it in order to avoid the injury which may result if the Shariah is followed strictly. For



instance, hunger, if not satisfied, results in death. If one does not find any Halal thing to satisfy the hunger, he can use even the Haram thing to satisfy his hunger to the extent that he can survive. Dr. Muslehuddin observes the importance of this doctrine in these words:

"The Rule of Necessity and Need occupies a very important place in the Shariah because of its various benefits and advantages. It takes cognizance of the genuine needs of society and provides facilities to those who are confronted with hardships. It has an amazing capacity to meet every emergency in the life without changing the Law. Law is not changed under this rule for it is not a free licence to change the Law and what is permitted under it has its limitations as to time and extent thereof. Being of resilient character it ceases to operate as soon as the urgency is over, the status quo of law is, thus, maintained. Law is enabled to remain stable and also to accomodate the change"(12)

Hardship refers to necessity and need and not to a non essential or luxurious interest. This doctrine has application only when there is no substitute and without resorting to prohibited things the great injury may result. The Shariah is considerate enough to take notice of particular occasions where its severity has to be mitigated in order to provide facilities to those who are subject to hardships. Holy Qur'an says:-

"God desireth for you ease; He desireth not hardship for you" (13)

"He has chosen you and hath not laid upon you in religion any hardship" (14)

This doctrine of the Shariah is the beautiful example of Shariah's flexibility which can accomodate any change in the society and meet every eventuality in life. The application of this doctrine comes to an end when the urgency is no more and the hardship has disappeared.

**Shariah generally provides Normative Guidelines:-**

The Islamic Shariah provides generally normative guidelines leaving operational guidelines to be worked out by Ummah according to the time and space. Islam is the final religion given by God to the mankind. It takes into account the entire course of human history while legislating and guiding the people. Since the dawn of civilization human beings have been advancing forward to the higher levels. In spite of the changes in basic needs and modalities, humanity has not cahnged in its essence. At the same time detailed application of these modalities have to be worked out in every fresh step in its movement. That is why the Shariah deliberately avoids detailed rules on the relevant subjects.

Mohammad Asad quotes the imaginary conversation of a person newly convert to Islam: "But is it necessary to have such

an all embracing legislation"? asks the convert, "Did the Law Giver really intend to let every movement of our hands, every turn of our heads, every step that we make, be regulated and rigidly fixed by law:?. "Did he really intend to make the Muslims into a community of automata running like a clock-work to the dictates of a most minute mechanical system of law covering every detail of our lives"? "Did He not like the highest type of man freely obedient to the eternal-law disciplined in his thoughts and actions, courageous in the exercise of his intellect, ever bent on finding deeper truth in God's Message, and on improving his social organization"? "Does not all this imply man's constant use of his intellect? Does it not imply that the Shariah was never meant to be a cage for human endeavor but rather a Divine frame-work of law on the basis of which man, aided by his unceasing Ijtihad, could rise to the greatest heights of knowledge and achievements?"(15)

The political laws of Islam provides another classical example of Shariah's adaptability. Shariah provides some basic injunctions which are clear in their wordings and sufficient to draw the theoretical base for Islamic political system. Political laws of Islam are based on the two most fundamental concepts the sovereignty of Allah and the Shura (the principles of consultation). Sovereignty of Allah implies his complete authority over all visible and invisible affairs in the spectrum of Islamic state. It negates all authorities which



directly or indirectly challenges His will. Holy Qur'an says:-

"Those who do not judge by what God has revealed - those indeed are the evil doers"(16)

The second fundamental concept of Shura is, infact, an offshoot of Allah's sovereignty. He is only supreme Being and all others are equal. It brings an idea in the realm of politics that everybody should be heard and the decision affecting the public should be taken only after due consultation among them. Holy Qur'an says:

"Their (the Believers) communal business (amr) is to be (transacted) consultation among themselves"(17)

"Take counsel with them in all communal business (amr) and when you have decided on a course of action, place your trust in God"(18)

These two verses are the basis of all political laws of Islam and Ummah has all rights to adopt any political system keeping in view the challenges of time and space. But the outer expression of such system should conform with the laws enshrined in the Qur'an and Sunnah. The system adopted by pious Caliphs was a truth among many truths but not the only true form of Islamic administrative system. Mohammad Asad writes: If we examine objectively the political ordinance of the Qur'an and Sunnah, we find that they do not lay down any specific form of state, that is to say, the Shariah does not prescribe any definite pattern to which an Islamic state must conform, nor

does it elaborate it in a detailed constitutional theory. The political laws emerging from the context of the Qur'an and Sunnah is nevertheless not an illusion. It is very vivid and concrete in as much as it gives us the clear outline of a political scheme capable of realization at all times and under all conditions of human life. But precisely because it was meant to be realized at all times and under all conditions, that scheme has been ~~offered~~ in outline only and not in detail. Man's political, social and economic needs are time bound and, therefore, extremely variable. Rigidly fixed enactments and institutions could not possibly do justice to this natural trend towards variations, and so the Shari'ah does not attempt the impossible. Being a divine ordinance, it duly anticipates the fact of historical evolution, and confronts the believer with no more than a very limited number of broad political principles, beyond that, it leaves a vast field of constitution making activity, of governmental methods, and of day to day legislation to the Ijtihad of the time concerned" (19)

### **Textual Adaptability:-**

The approach has been to prepare the man to cope with the realities of legislation before it is promulgated. Said Ramadan writes: "A good example is the prohibition of intoxicants. It was ~~gradually~~ prohibited, first with the Qur'anic words: "They question thee about intoxicants and games

of chance. Say, In both is great sin and some utility for men, but sin of them is greater than their utility". (20) There is not, in this text, a definite prohibition of intoxicants. Then were revealed the words of Qur'an:

"O ye who believe: Approach not prayers with a mind befogged, until ye can understand All that ye say." (21)

"O ye who believe and games of chance and sacrificing to stones set up and divining by arrows are only uncleanness, the devil's work! So shun it so that you may succeed" (22)

If these texts are critically probed, it becomes clear that all the Qur'anic texts about intoxicants had been heading towards their prohibition. The first text stresses their evil as against their utility in order to stimulate a moral deterrent. The second text stigmatizes the intoxicants as spoiling the prayer, and forbid drinkers from coming to the mosques for prayers. It backs the moral deterrent with the necessity to avoid drunkenness in order to be able to perform the obligatory prayers at the proper times. In the third text the Qur'an describes intoxicants as the "devil's works" together with their prohibition. The Muslim society has been gradually prepared for such a forbidding intoxicants. When the final Words of God came down regarding the total prohibition, the Muslims poured forth on the ground all intoxicants which they had stored. History records that on the very day of its prohibition

wine flowed in the streets of Madina"(23)

The prohibition of intoxicants serves a very good example of Shariah's dynamism and throws light that before promulgating any law the public notions should be gauged and the people should be prepared mentally to cope with the law. Otherwise it will result into the utter failures of law. On the basis of this guidance the Islamic society in its true form can be achieved even in the modern times.

**Footnotes:-**

- (1) Ramadan, Said: Islamic Law: Its Scope and Equity, 39 (Geneva, 1970)
- (2) Bukhari-Vol. III, 109
- (3) The Holy Qur'an, 39:18
- (4) Id at 38:29
- (5) Id at 16:44
- (6) Id at 13:12
- (7) Asad, Muhammad: The Principles of State and Government in Islam, 18 (University of California Press, 1961)  
[Quoted from As Suyuti Al Jami as sagheer]
- (8) *Sahih Muslim*: Translated by *Abd Abdul Hamid Siddiqui* (Kitab Bhavan, New Delhi, 1978)
- (9) Iqbal, Muhammad: The Reconstruction of Religious Thoughts in Islam, 117, 118 (Lahore, 1989)
- (10) The Holy Qur'an, 2:286
- (11) Id at 2:173
- (12) Muslehuddin, M: Philosophy of Islamic Law and the Orientalists, 180 (Delhi, 1982)
- (13) The Holy Qur'an, 2:185
- (14) Id at 22:78
- (15) Asad, Muhammad: This Law of Ours, Arafat Magazine, 4 (Delhi, 1940)
- (16) The Holy Qur'an, 5:47
- (17) Id at 42:38
- (18) Id at 3:159
- (19) Op.cit.7 at 22, 23
- (20) The Holy Qur'an, 2:219
- (21) Id at 4:43

(22) Id at 5:90

(23) Op.cit.1 at 70,71

## CHAPTER-V

### The Shariah and Fiqh: Two Different Concepts

#### Shariah:-

"Literally the word Shariah means "Course to the watering place" and a "Resort of drinkers". The Arabs applied the term particularly to course leading to a watering place which was permanent and clearly marked out to the eye. Hence it means "clear path" and "highway" to be followed". (1) In the technical language of Islam the Shariah is the way prescribed by God for entire mankind to be followed. The Qur'an has used the term Shariah in this perspective. Godah says in His Holy Book:

"Then We gave thee a Shariah in religion, follow it and do not follow, the lusts of those who do not know" (2)

"To everyone (people) of you We have given a Shariah and a Minhaj" (3)

The Shariah is the only way which leads one into the fold of Islam. Since it is from the all embracing system of God it is unchangeable and infallible and it touches all outer and inner shades of human life. To get legal sanctions to anything in Islam it should have the clear backing of Shariah. The manifestation of Shariah has been through two sources: the Qur'an and the Sunnah. The Qur'an is the direct speech of God addressed to entire humanity and the Sunnah is the elucidation of these words through the life example of Prophet Mohammad. These two are the only sources of the Shariah.

The Shariah is the Nusus of the Qur'an and Sunnah and only these - that collectively constitute the real, eternal Shariah of Islam. The Shariah concerns itself exclusively with what the law - Giver has ordained in unmistakable terms as an obligation or put out of bounds as unlawful. Thus the real Shariah is extremely concise and therefore easily understandable. The ordinances of Qur'an and the Sunnah expressed in positive terms of law: "do this", "do not do that", "Such and such a thing is right, and therefore desirable", such and such thing is ~~wrong~~, and therefore to be shunned". These ordinances are described technically as Nusus. By the very nature, they are not subject to conflicting interpretations; in fact they are in no need of "interpretation" whatsoever, being absolutely self contained and unambiguous in their wording" (3a)

Thus the analysis of above paragraph gives the following ideas of the Shariah:

- (i) It is from the God Almighty given in unmistakable terms.
- (ii) It is mandatory in nature.
- (iii) It is ~~the~~ way prescribed by God for the entire mankind.
- (iv) Since it is from God, it is infallible and immutable.



### Fiqh:-

"The original meaning of Fiqh is the understanding the knowledge of something. In this sense, Fiqh and Fahm are synonyms. The word Fiqh was originally used by the Arabs for a camel expert in covering; he who used to distinguish the she camels that are lusting from those that are pregnant. Accordingly, the expression Fahl-Faqih was current among them. From this expression, it is believed, the meaning of deep knowledge and understanding of anything has been derived".<sup>(4)</sup>

The Shafii jurists define Fiqh as "the knowledge of the laws of the Shariat, relating to man's acts and derived from specific sources", and the Maliki jurists call it "the science of the commands of the Shariat in particular matters deduced by the application of a process of reasoning".<sup>(5)</sup>

In the earlier days the term Fiqh was used in a broader sense and it embraced the theological problems as well as the legal issues. Imam Abu Hanifa in his book Al-Fiqh-al-Akbar deals with the basic tenets of Islam like faith, Unity of God, His attributes, the life hereafter, Prophethood etc. The title of the book itself suggests that the term Fiqh was used in broader sense even including the theological problems. But later on the term Fiqh was gradually narrowed down, and ultimately came to be applied to the legal problems.

Fiqh has been divided into two portions: The Usul and Faru. The Usul literally means the roots of the law and the Faru means the branches of law. The science Usul deals with the first principles of interpretation, while the science of Faru deals with particular injunctions. Ahkam or the substantive law which really follows from the science of Usul. The science of Usul deals with the ~~sources of the law~~ and its interpretation, the science of Faru deals with the law as it is actually applied. There is a distinction between the first principle and the rules deduced from their application in Islamic Jurisprudence. (6)

Fiqh is the name given to the jurisprudence in Islam. In its widest sense, it covers all aspects of religious, political and civil life. It includes criminal law and procedure and finally constitutional law and laws regulating the administration of the State. In other words it deals with all the legal questions which arise in social life. Fiqh or the science of ~~Islamic law~~ is the study of one's rights and obligations derived from the Qur'an, the Sunnah of the Prophet, the consensus of opinion among the learneds (Ijma), and analogical deductions (Qiyas).

#### The Shariah and the Fiqh: A Comparison:-

Shariah emerges from the Divine will and that is why it is synonymous with infinity. All the positive qualities are epitomized in it as the Holy Qur'an says:-

"Thus indeed have we given in this Qur'an many facets to every kind of lesson (designed) for (the benefit of) mankind". (7)

"Say if all the sea were ink for my Sustainer's words the sea would indeed be exhausted ere my Sustainer's words are exhausted. And ~~(thus it would be)~~ if we were to add to it sea upon sea". (8)

Since the Shariah is from this infinite Divine will, it is all embracing, infallible and immutable. It encompasses everything and draws line of action for everything. The Fiqh is basically a human notion. It is the result of thinking process. As the meaning of the Fiqh tells, the process of understanding is the soul of Fiqh. ~~Understanding~~ presupposes ignorance and non-understanding. This state is totally absent in Divine Being but human beings are synonymous with this state. They construct their logic by applying their minds and then comprehend a thing. But Shariah is independent of human reason because it is from all knowing and all embracing Divine Being. He is one Who creates everything including the process of understanding. The Shariah is the way ordained by Him. The Holy Qur'an says:-

"For everyone of you we have ordained a divine law (Shariah) and an open road (Minhaj)" (9)

"And Allah has brought you forth from your mother's wombs knowing nothing but ~~He~~ has endowed you with hearing and

sight and minds so that you might have cause to be grateful". (10)

The Holy Qur'an asks man to ponder over everything including the matter of Din. So, naturally differences are bound to arise and that is why the Shariah has not only accepted but admired the differences of opinion. Holy Prophet said:

"The differences of opinions among the learned with in my community are (a sign of) God's grace". (11)

#### **Shariah is one but many Fiqh are possible:-**

With the finality of Prophethood the Shariah has been finalised once for all. Now there will be no more Prophet and there will be no more Shariah. But as the scholars of different ages, different places and with different socio-cultural background applied their minds in understanding the Shariah, there arose differences and various Fiqh came into being in the form of Schools. It was quite natural which had been appreciated by Prophet himself. But unfortunately it was unfolded in the most negative way in the later ages as the Schools were virtually given the permanence and Fiqh was identified with the Shariah.

The classical example of the plurality of Fiqh can be seen more strikingly in the laws of inheritance of Sunnis and Shias. Both follow the same Shariah but there are lot of differences in their laws of inheritance. Prof Mustafa Ali Khan

writes: The Sunnis take the specific provisions of the Holy Qur'an applicable to and affecting the individuals mentioned therein without disturbing the pre-Islamic customary laws and usages. They restrict the effect of specific provisions of Qur'an only to the cases specified therein and do not generalise them to extract general rules. Their approach is literal and verbal. They interpret these provisions simply as amendments relating to the individual instances and not replacing the customary provisions in general. Ordinarily Sunnis do not extend these alterations and amendments to cases not specified in the Qur'an or expressly mentioned by rules in specified manner and to the specific cases mentioned in the Qur'an and allow the principles of pre-Islamic customs and usages to stand as far as possible. the continued importance and dominations of agnates is an illustration of this distinct approach. The Shias on the other hand take these specific provisions of the Holy Qur'an as only illustrations of general principles underlying therein. The Shias do not take the specific provisions of Sura-al-Nisa as restricted to the individual instances mentioned therein but extend them to become rules of general application. From the specific cases mentioned in the Holy Qur'an they deduce rules and principles of general nature which according to them, underlie these provisions. The Shias take each instance as speaking not for itself but as indicating the possible

principles. These general rules, so deduced from the specific provisions, are then fused and blended with the existing customary practices to give a new set of rules of succession. These new rules, evolved by fusing the customary laws and Islamic reforms resulted in nearly replacing the pre-Islamic customary law by a new set of rules known as Shia laws of inheritance. The rejection of the rules of agnacy, the equalization of agnates and cognates, extending the similar rights to remote female heirs on the analogy of daughters and sisters etc., are the glaring consequences of the said attitude or approach" (12)

#### **Shariah: The genesis of Fiqh:-**

Fiqh emerges from the principles of Shariah. The Shariah generally provides normative guidelines and so far as the operational guidelines are concerned they are for the human beings to lay down. When the human beings apply their reason in the absence of clearcut injunctions of the Shariah, the Fiqh comes into being.

The Shariah is the fountain of the Fiqh and not vice-versa. The very word Shariah brings into our mind the idea of a system based on deep metaphysical foundation: Tawhid, Risalat and Akhirat. These three are purely the divinely concepts and the whole logic of the Shariah is rooted in these. Shariah is a system which is enacted by the Divine Will for the

welfare of mankind living on earth. As far as Fiqh is concerned it has its roots in the Shariah but it is evolved by human beings by applying their reasons. In fact the Shariah puts forth an inflexible and rigid circle within which the reason can be applied. The Shariah is infallible and immutable but this is not the case with Fiqh. It is the outcome of human wisdom which is fallible and it can be changed according to the changed circumstances and when the need arises.

The question of Fiqh arises only in the absence of clear injunctions (Nusus of the Qur'an and the Sunnah) because nobody has power to frame laws if the Shariah clearly speaks about it and set forth a clear legal frame work. Holy Qur'an says:

"Now whenever Allah and His apostle have decided a matter it is not for a faithful man or woman to follow another course of his or her own choice. (13)

The famous Hadith connected with Muad Ibn Jabal which speaks of Ijtihad also clarifies this point. According to the report Ijtihad of Muad is valid only in the absence of specific injunctions of both the Qur'an and the Sunnah. Ibn al Qayyim tried to establish the three conditions for the course and validity of Fiqh:-

(i) that it may be resorted to only in the absence of an applicable text of the Shariah.

(ii) that in no way it should contravene the Shariah.

(iii) that the course of reasoning should not become entangled in any kind of complication of expression which might affect the people of direct attachment to the Shariah or distort its brilliant clarity. (14)

The Shariah and Fiqh are not the different expressions of one and the same reality but entirely different entities. Even though nobody argued that the Shariah and Fiqh were the one and the same concept but practical approaches of many jurists manifested in their arguments that the door of Ijtihad was closed after 4th century A.H. and in order to be a Muslim one should follow any one of the four Fiqh. When the people associated themselves with one School or the other, the fallible Fiqh became identified with the infallible Shariah. The distinction between the two was lost and a period of legal unproductivity was started.

The main distinction between the two are:-

(i) The Shariah is the manifestation of God's will which emanates from His infinite knowledge. Hence it is infallible and immutable.

Fiqh is the outcome of man's understanding of the Shariah which is always conditioned with the orientation and time of Fuqaha. Hence fallible and changeable.



(ii) Obedience to the Shariah is absolute and unconditional. But in the case of Fiqh it is not so. One can't follow if he is not intellectually convinced.

(iii) Fiqh owes its birth from the Shariah but not vice versa.

(iv) The Shariah is permanent but Fiqh has to change with the changing of society.

(v) In Islam there is only one Shariah but many Fiqhs are possible.

#### **Conclusion:-**

The early doctors of Islam took inspiration from the Holy Qur'an and Sunnah and become the champions of dynamism: dozens of new Schools were born and each school tried to see the Shariah in the light of Shariah. The result was not a unified Fiqh but many mutually contradicting Schools. There were many reasons for this divergence such as the differences of scholars in their personal and theological orientations, time, place etc. All these factors played crucial roles in the formation of various Schools. In the beginning these differences had been a blessing because it enabled the Shariah to respond to the needs of various social groups who entered into the fold of Islam. The developments were exactly in accordance with the saying of Prophet: "The differences of opinion among the learned of my community are a sign of God's grace".

But later everything moved in an opposite direction. Allama Asad writes regarding the differences in these words: "As things stand at present, nobody in his senses can claim to discern an evidence of "God's grace" in the dissensions and differences of opinion which have converted the modern world of Islam into a formless, chaotic, culturally unproductive mass of humanity. Lacking fundamental agreement as to what the socio-political laws of Islam really imply, these dissensions and differences of opinion do not increase our creative powers rather they increase our doubt, our despondency, our cultural defeatism, and our disgust with ourselves and with our ideological heritage". (14)

The scholars of post classical period are mainly responsible for such cultural and legal unproductivity. They forgot the fact that the various understandings of the Shariah (various Schools of law) formed through the Shariah's interaction with various social orders are not Shariah but legal deductions of the scholars. The result was slavish adherence of the Schools of these early scholars who themselves were against such blind following. Out of boundless respect to these early scholars of Islam, the scholars of the post classical period came to the most unfortunate conclusion with far reaching consequences that the door of Ijtihad is closed. Instead of producing original works on Jurisprudence they started editing

and writing commentaries on the works of early scholars. Thus, the creativity was replaced by blind imitation in the legal segment of Ummah. The early scholars are not responsible for this legal calamity. They were original and honest and they never demanded from the Umma blind imitation of their views. It is the intellectual dishonesty of some later scholars who are responsible for the present stagnation.

All the failures and successes of Islamic world during the last several centuries can be attributed to the use or non-use of the principle of Ijtihad. We can see the successful utilisation of the principle, where it achieved the eye catching victories in all fields: cultural, social, political, legal, economical etc. The early jurists of Islam with the help of this mechanism responded positively to the call of society. But unfortunately in the successive centuries it has not been properly utilised or almost forgotten. This resulted in immobility of Islamic ~~legal system~~ which we are experiencing now in the form of stagnation in the social, cultural and legal fabric of Islam. What is needed today for the regeneration of Islam as a religion and an ideology is neither to follow the conventional Fiqh blindly or elevate it to the status of the Shariah. We have two important tasks before us: first, the elimination of all Ijtihadi legislation mixed with the eternal Shariah and its proper placing in the spectrum of Fiqh. Second,

we should work for new Fiqh such as political Fiqh, economic Fiqh, legal Fiqh etc. Plainly speaking we should do Ijtihad based on the frame-work of the Shariah with the intention of solving the multitude of problems which we have been facing in various fields.

After doing so we can achieve two important things that the Shariah will once again acquire its simplicity and compactness free from thick layers of conventional Fiqh. This in turn will help to enjoy the sweetness of the Shariah and protect it from deviated Ijtihad. The second important thing is that the spirit of enquiry will become once again alive in the Muslim world helping to ~~open~~ the closed door of Ijtihad and solving many of our problems and perplexities. If it is not done the present drift of Muslim society towards western legal system will continue and if it goes unchecked, there is a great danger to the Islamic legal system of being obliterated.



Sixty Eight only  
Mikal

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- (1) Hasan, Ahmad: The Early Development of Islamic Jurisprudence, 6,7 (Islamabad, 1970)
- (2) Asad, Muhammad: The Principles of State and Government in Islam, 13 (University of California Press, 1961)
- (3) Id at 12
- (3a) Ibid
- (4) Op.cit.1 at 1
- (5) Rahim, Abdul: Muhammadan Jurisprudence, 33 (Allahabad)
- (6) Khan, M.Hameedullah: The Schools of Islamic Jurisprudence, 5
- (7) The Holy Qur'an, 18:54
- (8) Id at 18:109
- (9) Id at 5:48
- (10) Id at 16:78
- (11) Suyuti, Jami as-sagheer  
Quoted by Asad, Muhammad: op.cit.2
- (12) Khan, Mustafa Ali: Islamic Law of Inheritance, 173-174 (Delhi, 1989)
- (13) Ramadan, Said: Islamic Law: Its Scope and Equity, 78 (Geneva, 1970)
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